Supreme Court of the United States

OCTOBER TERM, 1970

No. 758

UNITED STATES OF AMERICA,

Petitioner,

—v.—

RAYMOND J. RYAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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DOCKET ENTRIES

3/ 5/68 Ent Procds, Counsel and Witness Ryan and Ct Court Orders Stipulation granted that proceedings are taking place outside of the Grand Jury and outside of a public hearing.

Attorney Joyce for the Dept of Justice Moves to have the Court Order Witness Ryan to produce documents for inspection by the grand Jury on 4/15/68, all counsel argue to the Court, Court Orders Motion Denied, Ryan Exhibits 1 and 2 Admitted. By Order of Judge Manuel L. Real.

3/29/68 Fld Applic of deft Ryan for Order shortening time for service of Notices of Motion.

Fld Ord (CC) shortening time for service of Notice of Motion.

Fld Mot & Not of Mot retnble 4/8/68 at 2 PM bef (R) to quash subpoena duces tecum, as to deft Ryan.

Fld Mot & Not of Mot retnble 4/8/68 at 2 PM bef (R) to quash subpoena duces tecum pertaining to Ryan Investment Limited, et al

Fld affid of John Bateman Story in suppt of Mot to quash subpoena duces tecum.

Fld Memo of pts & auths in suppt of Mot to quash subpoena duces tecum.

4/ 3/68 Fld Affidavit of William Shirley Deverell in Support of Mot to Quash Subpoena Duces Tecum.

Fld Affidavit of John William Mills in Support of Mot to Quash Subpoena Duces Tecum.

4/ 8/68 Fld Govt's Memo in oppos to Ryan's Mot to quash subpoena.

4/ 9/68 Attys Miller, Simon and Sheridan for Petitioner Ryan make stmts to the Court, Attys Byrne, and Joyce make stmts to the Court, Court orders hearing on Petitioner Ryan's Mot to quash subpoena Duces Tecum cont to 5/14/68, at 11 AM and service on subpoena Duces Tecum modif to be returned on 5/14/68, at 10:00 AM. (R).

Docket Entries

4/ 8/68 Court ords case cont to 4/9/68, at 1:30 PM for hrg (R).

5/14/68 Attys Miller, Byrne, Joyce & Sheridan md stmts to the Ct, Ct ords on motn of the petnr Ryan, hrg on motn cont to 7/2/68), 11 am, Witn Ryan to appear befor the G/J on 7/10/68, 9:30 am. and any motns re Witness Hirschman be heard either on 5/20/68, 2 pm or 5/21/68, 11 am (R).

7/ 2/68 On mot of the govt, Ct ords hrg on mot of witness re: Ryan is cont to 7/10/68, 1:30 PM. Mld cys to all cnsl, thru office of US Atty, Los Angeles, Calif. (R)

7/ 8/68 Fld Notice of Intention as to witness John Ryan to raise an issue concerning the laws of the Republic of Kenya bef the Court on 7/10/68.

7/10/68 Fld affid of James Slater Burris. Counsel argue to the Court. Govt exbts 1, 2, 3 admitted. Court ords Mot of Witness Ryan to quash subpoena duces tecum is cont to 7/12/68 at 10 AM & ords Witness Miss Hanson to report to the Grand Jury on 7/12/68 at 9:30 AM. On Mot of Govt, Court ords stmts of Atty Philip Michael, AUSA, that portion of reporters Notes are to be sealed.

7/12/68 Coun argue the Mot to the Court, Govts exbts 3, 4, 4A admitted. Govt's exbt 3 under Seal by Ord of Court and Locked in Clerk's Office. Court ords Mot of witness Ryan is denied w/o prej & directs Atty Joyce to prepare findings & ord (R). Fld subst of attys for Witness Ryan, design of cnsl purs to Local Rule 2d & stip to continue appearance of Witness Ryan, Gorman & Hansen bef the Grand Jury on 7/24/68. (R).

7/24/68 LODGED proposed Court's Order (R).

7/24/68 Counsel mk sumts to the Court. Court ords matter cont to 7/25/68 at 10 AM for fur procs. (R).

DOCKET ENTRIES

7/25/68 Fld Court's Order (R).

7/25/68 Fur procs; hrg mot to quash subpoena: Witns Gorman & Ryan pres in Court. On Mot of witns' cnsl, ord Court room cleared. Cnsl argue mot to quash. Court's exbt No. 1 marked & admitted & placed under seal per Court ord. Ord prvious ord re production of diary by Witn Gorman dtd 7/12/68 is vacated, mot to quash is granted re production of diary by Witn Gorman, Court finds documents for production are property of Witn Ryan, mot to quash denied as to Witn Ryan, ord witns. Gorman & Ryan to appear bef Grand Jury 9/11/68, 9:30 AM. ord Witn Ryan to produce books, records, etc, of Ryan Invest. Ltd. of Nairobi & of Mawingo, Ltd of Nanyuki & nairobi. Govt to prepare ord. Fld affid of Wm. J. Gorman in suppt of mot to quash. (R)

8/ 5/68 Fld Notice of Appeal by Witness Raymond J. Ryan Notice of Appeal. Copy to Judge. Mld copies (3) to U.S. Atty 32 No. Spring St., L.A. Fld Cost bond on appeal in the sum of $250.00.

8/ 9/68 Fld witn's Raymond J. Ryan Designation of Record.

8/23/68 Fld ex parte applic and ord thereon for disclosure of record (JWC)

[Transcript, Vol. 2]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MANUEL L. REAL, JUDGE PRESIDING

Misc. Grand Jury

In the Matter of

RAYMOND RYAN,

A Witness Before the Grand Jury

* * * *

[2] APPEARANCES:

For the Department of Justice:

EDWARD JOYCE, Esq. and
PHILIP MICHAEL, Esq.
Department of Justice
Washington, D. C.

For the Witness Raymond Ryan:

SIMON, SHERIDAN, MURPHY,
THORNTON & MEDVENE
625 South Kingsley Drive
Los Angeles, California; by

ROBERT E. HINERFELD, Esq.; and

HERBERT J. MILLER, JR., Esq.,
JOHN CASSIDY, Esq., and
CHARLES N. SHAFFER
Washington, D. C.

[3] LOS ANGELES, CALIFORNIA
TUESDAY, MARCH 5, 1968, 11:30 A.M.

* * * *

[8] THE COURT: Mr. Miller?

MR. MILLER: May it please the court, my name is Herbert J. Miller, Jr. I represent the witness Mr. Ryan.

Briefly the history of this case I think probably goes back some two and a half years.

Mr. Ryan testified on behalf of the [9] Government in a case involving a gentleman by the name of Marshall, also known as Caifano, Marshall Caifano, Smedhoff and Delmonico. Subsequent thereto he testified as a Government witness. He came from Africa without a Government subpoena and did testify on behalf of the Government in that case.

Some time thereafter in mid-1965 special agents of the Internal Revenue Service attended his office of the office of the Ryan Oil Company in Evansville, Indiana. They were given complete access and complete cooperation with respect to the records of that company.

In addition to those special agents at approximately the same time several businesses that Mr. Ryan either owns or has an interest in in the California area were made the subject of a massive tax investigation.

He was subpoenaed to appear and did appear and testify before a grand jury in the Southern District of New York in November of 1965.

In November of 1966 he was served with an IRS summons requesting, inter alia, that he produce the records of Mawingo, Ltd., the same records basically which are in issue here.

At that time he filed statements with the Internal Revenue Service and was in fact interviewed by the Internal Revenue Service. These statements are a [10] matter of record with the Internal Revenue Service.

He stated that he did not have possession or control of the records and that he was unable to produce them but that he would make and did in fact make a trip to Africa in an effort to obtain these records, which was unsuccessful.

Subsequent to this no action was taken to enforce the Internal Revenue summons.

In July of 1967, last year, in effect a forthwith grand jury subpoena was served on Mr. Ryan at the El Mirador Hotel in Palm Springs, California, and on two persons associated with him, Helen Hansen and Frank Hayden. If my chronology is correct the subpoena was served on the 26th or 27th of July and returnable the following day, the 28th.

Pursuant to agreement the records that were available at the El Mirador Hotel were handed over to Internal Revenue agents. Subsequently on August 2nd another subpoena was served on the witness, Raymond Ryan, as well as Miss Hansen and Mr. Hayden.

Pursuant to the second subpoena, which required the production of the books of Mawingo, Ltd., Miss Hansen and Mr. Hayden testified before the federal grand jury in this district. Mr. Ryan was excused from testifying at that time. Testimony was given on August 16, [11] 1967.

Subsequent to that date in November of 1967, November 21st, the Internal Revenue Service again served an IRS summons, this time on myself as counsel for Ray Ryan. Again this summons asked, inter alia, that certain records be produced including the records of Mawingo Company, Ltd.

Discussions were had by myself with the Internal Revenue Service agents. No decision really was made as to whether we would comply with the IRS summons or not. The matter was under discussion. As a matter of fact, discussion was had with IRS agents on January 26th of 1968.

On February 2nd a letter was written by the Department of Justice to myself from Mr. Joyce saying that he would like to have Mr. Ryan present at the grand jury in Los Angeles on the 21st day of February, 1968. I pointed out I had a prior commitment and Mr. Joyce very kindly agreed to set the matter over until today.

I would like to point out several reasons, if the court please, why at this stage it would be beyond the juris-

diction of this court to issue the order requested by Mr. Joyce.

In the first place the grand jury for whom Miss Hansen and Mr. Hayden testified and before whom Mr. Ryan was to have testified, which is the March term, 1967 grand jury—pardon me, if the court please. This grand [12] jury of which Mr. Durward L. Robertson was the foreman, was impaneled March 2, 1967. By order of Judge Thurmond Clarke, Chief Judge, United States District Court, dated September 27, 1967, an order was entered. I will read the ordering part of that order.

> "It is ordered that the grand jury impaneled March 2, 1967, of which Mr. Durward L. Robertson is foreman, is hereby discharged."

This order is dated September 27, 1967. If the court please, I might say I have been unable to obtain an exemplified copy of the original of that order. It appears to be unavailable. I have, however, obtained—

MR. JOYCE: If the court please, we will stipulate the order was entered. I saw it for the first time this morning. We will stipulate that such order was entered by the court discharging the grand jury.

THE COURT: Is it so stipulated?

MR. MILLER: Yes. If the court please, for the record standpoint it might be helpful to mark as exhibits a copy of the order which we obtained from the clerk which I would mark as Ryan's Exhibit No. 1 for identification and also the civil docket entry.

MR. JOYCE: We have no objection.

THE COURT: Ryan's 1 and 2 in evidence.

THE CLERK: Ryan's Exhibits 1 and 2 received [13] into evidence.

> (The documents referred to were marked Ryan's Exhibits 1 and 2 and received in evidence.)

MR. MILLER: If the court please, by reason of this order the grand jury subpoena of August 2, 1967 became defunctus officio. I have a substantial number of cases and case law to support this motion. I do not know how

the court would like to proceed. I can argue the point now.

THE COURT: I would like to hear from the Government on the other side of that.

MR. MILLER: All right, sir.

MR. JOYCE: Your Honor, at this point we are not asking the court to enforce the subpoena that was originally served. We are asking the court to order the witness who is presently in the courtroom within the jurisdiction of the court, who appeared before the current grand jury this morning and who refused to comply with the request and refused to answer any questions with respect to the records.

Our position with respect to the other grand jury is, of course, that counsel had agreed to make Mr. Ryan available at a time mutually satisfactory to both of us. However, whether he was in this courtroom and he was before th[e] grand jury today pursuant to a subpoena that [14] was served in August, or whether he was there pursuant to the agreement—

THE COURT: I want to understand you clearly as to whether or not you are asking this court to order Mr. Ryan to answer questions concerning the records or whether you want this court to order Mr. Ryan to produce those records?

MR. JOYCE: We would like this court to order Mr. Ryan to produce the records before the next grand jury. We do not anticipate taking any testimony from Mr. Ryan except insofar as he will identify the records and state his position as the custodian. Nevertheless, he is here, whether it is voluntarily on his part, whether it is pursuant to agreement with counsel or pursuant to the subpoena he is nevertheless before the court and was before the grand jury this morning.

THE COURT: Let us assume, I think we can for the purposes of the discussion, that this is a proceeding ab initio. In other words, a man comes before the grand jury and is asked, I do not know whether he was asked because I have nothing before me that he was even asked by the foreman of the grand jury to produce any records—

MR. JOYCE: He refused to answer any questions with respect to the records.

THE COURT: He refused to answer any questions. [15] The question then before me is whether or not that is what we are here for or whether we are here to ask him to produce records and whether or not the procedure is the issuance of a grand jury subpoena for April 15, 1968 for the production of records. At this time I think I have the jurisdiction to order him to answer questions if he can without the records present about those records. I do not know that I can order him to produce records. The proper procedure to do that would be by subpoena rather than by order of the court.

MR. JOYCE: We have a subpoena for his appearance on April 15th in this at this grand jury session, your Honor.

I am now handing the defendant a copy thereof serving him with the subpoena. I also believe that your Honor has ample authority to order him to comply with the subpoena that has just been served on him or to order him to bring the records before the court.

THE COURT: The subpoena is for April 15th and he has not said on April 15th he would not produce them.

MR. JOYCE: That is correct.

THE COURT: I do not know whether I can do it in advance, can I? If the man shows up on April 15th we may be back here, this may just be an exercise in futility at this point. Until he refuses there is nothing [16] before the court upon which I can order, is there?

MR. JOYCE: I believe that the court can order him to appear and bring the records with him. However, I also believe the subpoena will suffice.

THE COURT: It is a subpoena situation and I think you may have to take up that problem at that time. I will hear you on the question as to whether or not you want him ordered to answer certain questions before the grand jury at this time.

MR. JOYCE: We would withhold any request for compulsion of his testimony until such time as the grand jury reconvenes on April 15, your Honor.

THE COURT: Is there anything else?

MR. MILLER: No, sir, except that I believe I can safely assume we have our normal right to move to quash if we so desire.

THE COURT: You have all the rights. I do not think we could make an order which would be an order to enforce a subpoena which has not yet been refused so I take it there would be no reason for the proceedings here to continue.

The request for the order to produce records before the grand jury will be denied.

MR. MILLER: Thank you.

THE COURT: Is there anything further?

MR. SHAFFER: Thank you, your Honor.

[Transcript, Vol. 1]

* * * *

[48]

AO Form No. 110 (Rev. 5-60)

Subpoena to Testify Before Grand Jury

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

To Ray Ryan
Director Mawingo Limited
d/b/a Mt. Kenya Saffari [*sic*] Club
Nanyuki, Kenya

You are hereby commanded to appear in the United States District Court for the Central District of California at 312 N. Spring Street in the city of Los Angeles on the 15 day of April 1968 at 10:00 o'clock A.M. to testify before the Grand Jury and bring with you[1] all books, records, papers, and documents in your possession or under your custody and/or control, either personally or as corporate officer, director, or representative, pertaining to Ryan Investment Limited, Nairobi, Kenya, Mount Kenya Safari Club, Nanyuki and Mairobi [*sic*], Kenya, Nawingo [*sic*] Limited, Kanyuki [*sic*] and Nairobi, Kenya, Zimmerman Limited, P. O. Box 2127, Nairobi, Kenya, and Seven-Up Bottling Co. (Kenya) Limited, Nairobi, Kenya, including but not limited to checkbooks, books of accounting, disbursement journals, and any and all correspondence relating to these five entities, as well as records, books, papers, documents and correspondence relating in any way to the application of the currency control regulations and the foreign

[1] Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

investments protection act of Kenya to these five herein described entities, enterprises or corporations.

This subpoena is issued on application of the United States.

JOHN A. CHILDRESS
Clerk

By ROBERT J. FOLLIS
Deputy Clerk

Date March 5, 1968

WM. MATTHEW BYRNE, JR.
U. S. Attorney
312 North Spring Street
Los Angles, Calif. 90012

RETURN

Received this subpoena at on
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copy to h

Date ....., 19....

By .....

Service Fees
Travel ..... $
Services ....
Total ..... $

[2]

[Filed Mar. 29, 1968]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 1926 Mis.

In the Matter of the Appearance of

RAYMOND JOHN RYAN,
A Witness

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM

* * * *

[7]

II

THE WITNESS RYAN WAS IMMUNE FROM SERVICE OF THE SUBPOENA.

On July 26, 1967, Ryan, a resident of Evansville, Indiana, was subpoenaed in California to appear July 28, 1967, before the federal Grand Jury in Los Angeles and produce records of Mawingo Ltd., d/b/a the Mount Kenya Safari Club [Exhibit "A" hereto]. Some records listing members of the Mount Kenya Safari Club were located in a small office in the El Mirador Hotel, Palm Springs, California. These records were turned over to Internal Revenue Service agents by Miss Hansen and Mr. Hayden, employees of the El Mirador who were also subpoenaed.

On August 2, 1967, new subpoenas were served on Ryan, Hansen and Hayden returnable August 16, 1967 [Exhibit "B" hereto]. Hayden and Hansen appeared before the Grand Jury this date. Ryan did not, there being an arrangement between counsel that he was excused. On September 27, 1967, Chief Judge Thurmond Clark signed an order discharging the Grand Jury be-

fore which Hayden and Hansen had appeared and Ryan had been subpoenaed to appear [Exhibit "C" hereto].

On November 21, 1967, an Internal Revenue Service summons was issued commanding, *inter alia*, the production of Mawingo Ltd. records physically located in Kenya, Africa [Exhibit "D" hereto]. That summons has neither been complied with nor enforced. The Department of Justice by letter dated February 2, 1968, instructed Ryan to appear before the Grand Jury February 21, 1968, pursuant to the subpoena served August 2, 1967 [Exhibit "E" hereto]. The appearance date was subsequently extended to March 5, 1968.

Ryan returned from Africa. On March 5, 1968, the Government requested Judge Real to enter an order requiring [8] Ryan to produce the documents called for by the subpoena. The court denied the Government's request because there was no outstanding process. The August 2, 1967, subpoena was void, *functus officio*, the Grand Jury issuing it having been discharged. The Government thereupon served the witness Ryan with a new grand jury subpoena in the courtroom and in the presence of the court (See transcript of hearing before Judge Real, March 5, 1968). This was faulty service because the witness was immune from process and service in the presence of the court is void.

* * * *

[22-23]

EXHIBIT A TO MEMORANDUM

AO Form No. 110 (Rev. 5-60)

Subpoena to Testify Before Grand Jury

UNITED STATES DISTRICT COURT
FOR THE
EASTERN [*sic*] DISTRICT OF CALIFORNIA

To Mr. Ray Ryan, Director Mawingo, Ltd., dba
The Mount Kenya Safari Club, Nanyuki, Kenya,
East Africa
c/o El Mirador Hotel, Bungalow 512
Palm Springs, California

You are hereby commanded to appear in the United States District Court for the Central District of California at Rm. 827 U.S.Ct.House, 312 N. Spring Street in the city of Los Angeles on the 28th day of July 1967 at 9:30 o'clock A.M. to testify before the Grand Jury and bring with you[1] 1) All records, papers and documents pertaining to the operation of Mawingo, Ltd. dba Mount Kenya Safari Club, including but not limited to the following:

(1) Lists, card index, ledgers, application forms or any other records showing the identity of the members of the Mount Kenya Safari Club.

(2) Records reflecting the receipt of money by the Mount Kenya Safari Club or its representatives from members or others for initiation fees, dues, special assessments or other purposes.

(3) Records pertaining to the disbursement of money by or on behalf of the Mount Kenya Safari Club such as disbursement papers or other books of accounting,

[1] Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

paid invoices, cancelled checks, check books or other memoranda.

(4) Correspondence dealing with the management, and/or financial affairs of the Mount Kenya Safari Club, its membership, promotion or publicity.

This subpoena is issued on application of the

JOHN A. CHILDRESS
Clerk

By ROBERT J. FOLLIS
Deputy Clerk

Date July 26, 1967

WM. MATTHEW BYRNE, JR.
U. S. Attorney
DAVID R. NISSEN
Asst. U. S. Attorney
Telephone: 688-2422

RETURN

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and on at I served it on the
within named by delivering a
copy to h

Date ____, 19__

By ____

Service Fees
Travel ____ $
Services ____ ____
Total ____ $

[24-25]

EXHIBIT B TO MEMORANDUM

AO Form No. 110 (Rev. 5-60)

Subpoena to Testify Before Grand Jury

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

To Mr. Ray Ryan, Director Mawingo, Ltd., dba
The Mount Kenya Safari Club, Nanyuki, Kenya,
East Africa
c/o El Mirador Hotel, Bungalow 512
Palm Springs, California

You are hereby commanded to appear in the United States District Court for the Central District of California at Rm. 827 U.S. Courthouse, 312 North Spring Street in the city of Los Angeles on the 16th day of August, 1967 at 1:30 o'clock P.M. to testify before the Grand Jury and bring with you[1] All records, papers and documents pertaining to the operation of Mawingo, Ltd., dba Mount Kenya Safari Club, including but not limited to the following:

(1) Lists, card index, ledgers, application forms or any other records showing the identity of the members of the Mount Kenya Safari Club.

(2) Records reflecting the receipt of money by the Mount Kenya Safari Club or its representatives from members or others for initiation fees, dues, special assessments or other purposes.

(3) Records pertaining to the disbursement of money by or on behalf of the Mount Kenya Safari Club such as disbursement papers or other books of accounting, paid

[1] Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

invoices, cancelled checks, check books or other memoranda.

(4) Correspondence dealing with the management, and/or financial affairs of the Mount Kenya Safari Club, its membership, promotion or publicity.

This subpoena is issued on application of the United States

JOHN A. CHILDRESS
Clerk

By ROBERT J. FOLLIS
Deputy Clerk

Date August 2, 1967

WM. MATTHEW BYRNE, JR.
U. S. Attorney
DAVID R. NISSEN
Asst. U. S. Attorney
Telephone: 688-2422
DRN:mlm

RETURN

Received this subpoena at on
and on at I served it on the
within named by delivering a
copy to h

Date _____, 19___

_____

By _____

Service Fees
Travel _____ $
Services _____ _____
Total _____ $

[26]

EXHIBIT C TO MEMORANDUM

[Filed Sep. 27, 1967]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

IN THE MATTER OF THE GRAND JURY IMPANELED MARCH 2, 1967, FOR THE FEBRUARY 1967 SESSION OF COURT

(Mr. Durward L. Robertson, Foreman)

ORDER DISCHARGING GRAND JURY

It appearing to the Court that the Grand Jury, of which Mr. Durward L. Robertson is the Foreman was impaneled on March 2, 1967 to serve during the February 1967 Session, and that the work of said Grand Jury has been completed;

IT IS ORDERED that the Grand Jury impaneled March 2, 1967 of which Mr. Durward L. Robertson is foreman, is hereby discharged.

DATED: September 27, 1967.

THURMOND CLARKE
Chief Judge
United States District Court

Presented by:

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

MICHAEL HEUER
Assistant U. S. Attorney

By MICHAEL HEUER
MICHAEL HEUER
Attorneys for Plaintiff
United States of America

[27]

EXHIBIT D TO MEMORANDUM

U. S. Treasury Department—Internal Revenue Service

SUMMONS

In the matter of the tax liability of

Raymond J. Ryan (a/k/a Ray Ryan) & Helen Ryan
600 Lombard Avenue
Evansville, Indiana

Internal Revenue District of Indianapolis, Indiana
Period(s) Years 1957 through 1965, Inclusive

THE COMMISSIONER OF INTERNAL REVENUE

To: Ray Ryan

At: Evansville, Indiana

GREETINGS:

You are hereby summoned and required to appear before Special Agent Glen Johnson, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the time and place hereinafter set forth:

See Attachment A setting forth therein the books, records and documents required for production at the time and place designated below. This attachment is incorporated herein and made a part hereof as though it was stated in full on the face of this Summons.

Place and time for appearance:

At The Internal Revenue Service Office, Intelligence Division, 214 S. E. 6th Street, Evansville, Indiana, on the 19th day of December, 1967, at 10:00 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 21st day of November, 1967.

ATTESTED COPY

Signature: Glen Johnson

Title: Special Agent

[28]

ATTACHMENT A

(A) The following described records of the RYAN OIL COMPANY, 218 Court Building, Evansville, Indiana, for the year 1965:

(1) General Journal and Voucher Register
(2) Cash Receipts Journal
(3) Billing Journal
(4) Cash Disbursement Journal
(5) General Ledger
(6) All underlying documents relating to general journal and adjusting entries (folders referred to as Journal Vouchers)
(7) Copies of all Invoices
(8) Bank statements, cancelled checks and copies of deposit tickets
(9) Workpapers used in connection with the preparation of the RYAN OIL COMPANY Federal tax return filed for the year 1965
(10) Subsidiary Ledgers relating to the general ledger entries

(B) Copies of all bank statements; cancelled checks and correspondence relating to all bank accounts maintained at the COMMERCIAL CREDIT BANK, Zurich, Switzerland, under the names of RAY or HELEN RYAN; RYAN INVESTMENTS LIMITED; MOUNT KENYA SAFARI CLUB and MAWINGO LIMITED, for the years 1959 through 1965, inclusive.

(C) Copies of all bank statements; cancelled checks and all correspondence relating to the bank account maintained at the BARCLAYS BANK, D. C. O., Nanyuki, Kenya, under the name of RAY RYAN during the years 1959 through 1965, inclusive.

(D) Copies of all bank statements; cancelled checks and all correspondence relating to the bank account maintained at the BARCLAYS BANK, D. C. O., Nairobi, Kenya, under the name of RAY RYAN during the years 1959 through 1965, inclusive.

[29]

EXHIBIT E TO MEMORANDUM

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C. 20530

Address Reply to the Division Indicated
and Refer to Initials and Number
FMV:ETJ:cav
123-66

Herbert J. Miller, Jr., Esq.
1701 K Street, N. W.
Washington, D. C.

February 2, 1968

Dear Mr. Miller:

In accordance with the request of Mr. Cassidy of your firm, I am herewith confirming the telephone conversation between him and Mr. Edward Joyce of the Organized Crime Section of the Criminal Division.

As stated, Mr. Ray Ryan, your client, was served with a subpoena duces tecum to appear before a Federal Grand Jury at Los Angeles, California on August 16, 1967. At that time he was excused from appearing and producing records upon the agreement that he would be present at any future meeting of the Grand Jury upon proper notification.

I am hereby notifying you that Mr. Ryan's presence before the said Grand Jury pursuant to the aforementioned subpoena will be required at 10:00 A.M. on Wednesday, February 21, 1968 at the Federal Courthouse in Los Angeles, California.

Sincerely,

FRED M. VINSON, JR.
Assistant Attorney General
Criminal Division

By: /s/ Henry E. Petersen
HENRY E. PETERSEN
Chief, Organized Crime and
Racketeering Section

[30]

EXHIBIT F TO MEMORANDUM

Post Office Box 104
August 1, 1966

Mr. Raymond J. Ryan
Mount Kenya Safari Club
Nanyuki, Kenya

Dear Mr. Ryan:

As you know the Internal Revenue Service has been examining the Federal income tax returns filed by you and your wife, Helen, for the years 1957 through 1965. In this connection, it was necessary to audit the records of the Ryan Oil Company, Evansville, Indiana, as well as several other business entities located in the Palm Springs, California, area in which you have or had a financial interest.

Under date of September 13, 1965, you gave Messrs. William Gorman and Wilbur Dassel, Power of Attorney to represent you during the course of this income tax investigation. Mr. Gorman and your Attorney, Mr. Dassel, have informed me that they have discussed the audit of your tax returns with you and that you expressed the desire to cooperate fully with the Internal Revenue Service. Accordingly, Mr. Gorman has voluntarily submitted the books and records of the Ryan Oil Company for audit purposes. We sincerely appreciate the cooperation you have extended through Mr. Gorman.

We have now reached the point where most, if not all of the audits in the Palm Springs area will be closed within the very near future. Undoubtedly, you will receive copies of the Internal Revenue Agents' reports through Mr. Gorman or your West Coast representatives.

We cannot complete the audit of your individual returns until we have had an opportunity to examine records

relating to your business ventures in Kenya. Mr. Gorman states that the books and records of these ventures are under your control and are physically located in Kenya. He has suggested that we write directly to you regarding the proposed examination of those records.

[31]

The Internal Revenue Service is tentatively planning to send a representative to Kenya for the purpose of examining the books and records of your business ventures in that country. It is hoped that a determination will then be made as to whether or not the profits or losses resulting from these foreign operations are subject to the United States Income Tax Laws. However, before making such a trip we would like your assurance that the applicable records will be made available to the examining agent.

We will appreciate an early reply indicating whether or not you will consent to the examination of the records of your business ventures in Kenya and, if so, the name of the person, or persons, who will make these records available to our representatives.

Very truly yours,

/s/ Glen Johnson
GLEN JOHNSON
Special Agent
Intelligence Division

c.c.
William J. Gorman
c/o Ryan Oil Company
Evansville, Indiana
Wilbur Dassel
Attorney-at-Law
Evansville, Indiana

[32]

EXHIBIT G TO MEMORANDUM

U. S. Treasury Department—Internal Revenue Service

SUMMONS

To Wilbur Dassell

In the matter of the tax liability of

Raymond J. Ryan (a/k/a Ray Ryan) and Helen Ryan
600 Lombard Street, Evansville, Indiana, or,
218 Court Building, Evansville, Indiana

Internal Revenue District of Indianapolis, Indiana
Period(s) For the calendar years 1957
through 1965, inclusive

THE COMMISSIONER OF INTERNAL REVENUE

To: Ray Ryan, Director of the following Corporations: (1) Mount Kenya Safari Club Establishment, Liechtenstein; (2) Ryan Investments, Limited, Kenya, East Africa; (3) Mawingo Limited, Kenya, East Africa

At: 600 Lombard Street, Evansville, Indiana

GREETINGS:

You are hereby summoned and required to appear before Special Agent Glen Johnson, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the time and place hereinafter set forth:

See Attachments A, B and C, setting forth therein the books, records and documents required for production at the time and place designated below. These attachments are incorporated herein and made a part hereof as though they were stated in full on the face of this Summons.

Place and time for appearance:

At the Internal Revenue Office, Intelligence Division, 214 S.E. 6th Street, Evansville, Indiana on the 3rd day of January 1967, at 10:00 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 18th day of November, 1966.

ATTESTED COPY

Signature: Glen Johnson
GLEN JOHNSON

Title: Special Agent

[33]

EXCERPTS FROM THE INTERNAL REVENUE CODE

Sec. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Sec. 6420. GASOLINE USED ON FARMS.

* * * *

(e) Applicable Laws—

(2) Examination of Books and Witnesses.—For the purpose of ascertaining the correctness of any claim made under this section or the correctness of any payment made in respect of any such claim, the Secretary or his delegate shall have the authority granted by paragraphs (1), (2), and (3) of section 7602 (relating to examination of books and witnesses) as if the claimant were the person liable for tax.

Sec. 6421. GASOLINE USED FOR CERTAIN NONHIGHWAY PURPOSES OR BY LOCAL TRANSIT SYSTEMS.

* * * *

(f) Applicable Laws—

(2) Examination of Books and Witnesses.—For the purpose of ascertaining the correctness of any claim made under this section, or the correctness of any payment made in respect of any such claim, the Secretary or his delegate shall have the authority granted by paragraphs (1), (2), and (3) of section 7602 (relating to examination of books and witnesses) as if the claimant were the person liable for tax.

Sec. 7603. SERVICE OF SUMMONS.

A summons issued under section 6420(e)(2), 6421(f)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

Sec. 7604. ENFORCEMENT OF SUMMONS.

(a) Jurisdiction of District Court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as

required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

Sec. 7605. TIME AND PLACE OF EXAMINATION.

(a) Time and Place.—The time and place of examination pursuant to the provisions of section 6420(e)(2), 6421(f)(2), or 7602 shall be such time and place as may be fixed by the Secretary or his delegate and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602, or under the corresponding authority of section 6420(e)(2) or 6421(f)(2), the date fixed for appearance before the Secretary or his delegate shall not be less than 10 days from the date of the summons.

Sec. 7210. FAILURE TO OBEY SUMMONS.

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 6420(e)(2), 6421(f)(2), 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

[34]

ATTACHMENT A

Ray Ryan, Director

MOUNT KENYA SAFARI CLUB ESTABLISHMENT, Leichtenstein [*sic*]

(A corporation operating in Kenya, East Africa)

The following records of MOUNT KENYA SAFARI CLUB ESTABLISHMENT:

1. Copies of Articles of Incorporation and/or agreements relating to the incorporation or formation of the Mount Kenya Safari Club Establishment, a company incorporated in Leichtenstein in or about December 1959.
2. General ledgers for the period from December 1. 1959 through June 30, 1963.
3. Cash receipts and disbursement journals for the period from December 1, 1959 through June 30, 1963.
4. Copies of balance sheets and profit and loss statements for the period from December 1, 1959 through June 30, 1963.
5. Copies of audit reports for the period from December 1, 1959 through June 30, 1963.
6. Copies of all bank statements and canceled checks for the period from December 1, 1959 through June 30, 1963.
7. Copies of bank deposit tickets for the period from December 1, 1959 through June 30, 1963.
8. Correspondence files; agreements and other documents relating to the acquisition by the MOUNT KENYA SAFARI CLUB ESTABLISHMENT of the shares of stock in a corporation known as MAWINGO LIMITED, Kenya, East Africa.

9. Correspondence files; agreements and other documents relating to the registration of the shares of stock of MAWINGO LIMITED in the name of Commercial Credit Bank, Zurich, Switzerland, as nominee of the MOUNT KENYA SAFARI CLUB ESTABLISHMENT.
10. Copies of all income tax returns filed by the MOUNT KENYA SAFARI CLUB ESTABLISHMENT with the Government of Kenya during the years 1959 through 1963.
11. Corporate minute books or similar records maintained by the MOUNT KENYA SAFARI CLUB ESTABLISHMENT.
12. Copy of the order of dissolution and applicable attachments relating to the dissolution of the MOUNT KENYA SAFARI CLUB ESTABLISHMENT.

[35]

13. Copies of all Statutory Declarations filed by, or on behalf of, the MOUNT KENYA SAFARI CLUB ESTABLISHMENT with the Government of Kenya during the years 1959 through 1963.

[36]

ATTACHMENT B

Ray Ryan, Director

RYAN INVESTMENTS, LIMITED
KENYA, EAST AFRICA

The following records of RYAN INVESTMENTS LIMITED:

1. Copies of Articles of Incorporation and/or agreements and correspondence relating to the incorporation and formation of the RYAN INVESTMENTS, LIMITED, a Kenya, East Africa corporation formed on or about December 6, 1961.

2. General ledgers for the period from December 6, 1961 through December 31, 1965.
3. Cash receipts and disbursement journals for the period from December 6, 1961 through December 31, 1965.
4. Copies of balance sheets and profit and loss statements for the period from December 6, 1961 through December 31, 1965.
5. Copies of audit reports for the period from December 6, 1961 through December 31, 1965.
6. Bank statements and canceled checks for the period from December 6, 1961 through December 31, 1965.
7. Copies of all bank deposit tickets for the period from December 6, 1961 through December 31, 1965.
8. Correspondence files; agreements and other documents relating to the transfer of equity in the MOUNT KENYA SAFARI CLUB ESTABLISHMENT to RYAN INVESTMENTS, LIMITED on or about February 16, 1963.
9. Correspondence files; agreements and other documents relating to the transfer of stock by the Commercial Credit Bank, Zurich, Switzerland in a corporation known as MAWINGO LIMITED to RYAN INVESTMENTS, LIMITED.
10. Copies of all income tax returns filed by RYAN INVESTMENTS, LIMITED with the Government of Kenya during the years 1961 through 1965.
11. The corporate minute book or similar records maintained by the RYAN INVESTMENTS, LIMITED.

[37]

12. The corporation stock record book showing the stockholders and transfers of RYAN INVESTMENTS, LIMITED since the date of incorporation.

13. Copies of all Statutory Declarations including attachments, filed by, or on behalf of, the RYAN INVESTMENTS, LIMITED with the Government of Kenya during the years 1961 through 1965.

14. Correspondence files; agreements, copies of notes, mortgages or other evidence of indebtedness relative to loans or advances made by RYAN INVESTMENTS, LIMITED during the years 1961 through 1965, inclusive, to individuals, companies, or other entities.

15. Correspondence files, agreements, copies of notes, mortgages or other evidence of indebtedness relative to loans or advances received by RYAN INVESTMENTS, LIMITED from individuals, companies, or other entities.

[38]

ATTACHMENT C

RAY RYAN, DIRECTOR
MAWINGO LIMITED
KENYA, EAST AFRICA

The following records of MAWINGO LIMITED.

1. The stock record book showing the stockholders and stock transfers of MAWINGO LIMITED since December 1, 1959.

2. The stock minute book or similar records maintained by the MAWINGO LIMITED since December 1, 1959.

3. General ledgers for the period from December 1, 1959 through December 31, 1965.

4. Cash receipts and disbursement journals for the period from December 1, 1959 through December 31, 1965.

5. Copies of balance sheets and profit and loss statements for the period from December 1, 1959 through December 31, 1965.
6. Copies of audit reports for the period from December 1, 1959 through December 31, 1965.
7. Bank statements and canceled checks for the period from December 1, 1959 through December 31, 1965.
8. Copies of all bank deposit tickets for the period from December 1, 1959 through December 31, 1965.
9. Correspondence files; agreements, copies of notes, mortgages or other evidence of indebtedness relative to loans or advances received by MAWINGO LIMITED from individuals, companies or other entities during the period from December 1, 1959 through December 31, 1965.
10. Correspondence files; agreements, copies of notes, mortgages or other evidence of indebtedness relative to loans or advances made by MAWINGO LIMITED to individuals, companies or other entities during the period from December 1, 1959 through December 31, 1965.
11. Correspondence files or other documents relative to transfer of MAWINGO LIMITED stock to Commercial Credit Bank, Zurich, Switzerland, as nominee of corporation known as Mount Kenya Safari Club Establishment.

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[50]

[Filed Apr. 8, 1968]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 1926 Mis.

In the Matter of the Production of Records by

RAYMOND JOHN RYAN,
A Witness

AFFIDAVIT OF WILLIAM SHIRLEY DEVERELL IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM

[51]

AFFIDAVIT

I, WILLIAM SHIRLEY DEVERELL, of Post Office Box Number 111, Nairobi, Kenya make oath and say as follows:—

1. That I am an Advocate admitted to practice in the Courts of the Republic of Kenya, Africa, and am a Partner in the firm of Kaplan & Stratton, Advocates, P.O. Box 111, Queensway House, York Street, Nairobi, Kenya.
2. That I read Law and received a Bachelor of Arts Degree in Jurisprudence at Trinity College, The University of Oxford, England.
3. That I was called to the Bar at Grays Inn, in London in 1960.
4. That I was admitted to practice as an Advocate in the Courts of the Republic of Kenya in 1962. Subsequent to that time I have engaged full time in the practice of Law in the Republic of Kenya and have become fully conversant with the Statutes and Decisions forming the Laws of the said Republic.

5. That I have examined what purports to be a true copy of a Subpoena issued by the United States District Court for the Central District of California which copy is now produced to me and marked "W.S.D. 1" and I state, based on my experience as a Practitioner of Law in the said Republic of Kenya that a compliance with the provisions of that Subpoena by Mr. Ray Ryan if he were a Corporate Officer of [52] the Companies referred to therein would violate the Laws of Kenya. I am informed by Mr. J. B. Story, a Director of P. & M. Limited, which Company is the Company Secretary for Ryan Investments Limited, Mawingo Limited, and Zimmermann Limited, and I verily believe that Mr. Ray Ryan is not currently a Director or other Corporate Officer of any of these three Companies.

6. That I have formed the above opinion after perusing Section 147 of the Companies Act of Kenya which provides that the Books of Account of a Kenya Corporation may not be kept outside of Kenya without the consent of the Registrar of Companies who is a Public Official in the service of the Government of Kenya.

7. That Section 147 (1) provides in part that "every Company shall cause to be kept in the English language proper Books of Account with respect to (a) all sums of money received and expended by the Company in the matters in respect of which the receipt and expenditure takes place: (b) all sales and purchases of goods by the Company; (c) the assets and liabilities of the Company."

8. That Section 147 (3) (a) (b) provide as follows— "(a) The Books of Account shall be kept [53] at the registered office of the Company or, subject to the provisions of paragraph (b) of this subsection, at such other place as the directors think fit, and shall at all times be open to inspection by the directors."

"(b) The Books of Account shall only be kept at a place outside the Republic with the consent of the registrar and subject to such conditions as he may impose: and if Books of Account are kept at a place outside the Republic there shall be sent to, and kept at a place in, the Republic, and be at all times open to inspection by the directors, such accounts and returns with respect to the business dealt with in the Books of Account so kept as will disclose with reasonable accuracy the financial position of that business at intervals not exceeding six months."

9. That on the basis of the above provisions and my experience of the Law of Kenya, I conclude that it would be illegal for the above-mentioned documents to be removed from the country. An exception could be made with reference to Books of Account only if the Registrar of Companies were to give his consent. I am informed by the Registrar of Companies, and verily believe that consent to the keeping of the Books of Account outside the Republic [54] of Kenya is normally only given where a Company registered in Kenya has it's principal office in another Country, in which case consent is given for the Books of Account to be kept in that Country. I am further informed by the Registrar of Companies and verily believe that he would not consent to the removal of the Books of Account from Kenya for the purpose of producing them in Foreign Court proceedings.

10. That S.112 (2) of the Companies Act provides as follows:—

"The register of members shall be kept at the registered office of the Company: Provided that:—

(a) if the work of making it up is done at another office of the company, it may be kept at that other office, and

(b) if the company arranges with some other person for the making up of the register to be undertaken on behalf of the company by that other person, it may be kept at the office of that other person at which the work is done,

so, however, that it shall not be kept at a place outside the Republic.

11. That S.113 (3) of the Companies Act provides that the Index of members shall be kept in the same place as the register of members.

[55] 12. That S. 146 (1) provides that the Minute Book containing Minutes of General Meetings of the Company shall be kept at the registered office of the Company.

13. That in view of the above Section of the Companies Act I consider it to be contrary to the Law of the Republic of Kenya for the Register of Members, the Index of Members, the Minute Book or the Books of Account of a company incorporated in Kenya to be removed outside the Republic of Kenya.

14. That none of the documents, papers or correspondence prepared or filed by a company or the authorities relating to the application of currency, control regulations and the Foreign Investments Protection Act are public documents.

/s/ Wm. Deverell

SWORN by the above-named WILLIAM SHIRLEY DEVERELL at Nairobi this 28th day of March, One thousand nine hundred and sixty-eight.

Before me:

/s/ U. S. Kalsi

U. S. KALSI
Commissioner for Oaths
Advocate—Nairobi

* * * *

[Transcript, Vol. 3]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MANUEL L. REAL, JUDGE PRESIDING

Misc. Grand Jury

In the Matter of

RAYMOND RYAN,

A witness before the Grand Jury

* * * *

[2]

APPEARANCES:

For the Department of Justice:

WM. MATTHEW BYRNE, JR.
United States Attorney

EDWARD JOYCE
PHILIP MICHAEL
Department of Justice
Washington, D.C.

For the Witness Raymond Ryan:

SIMON, SHERIDAN, MURPHY, THORNTON & MEDVENE
625 South Kingsley Drive
Los Angeles, California; by

THOMAS C. SHERIDAN
WILLIAM SIMON; and
HERBERT J. MILLER, JR.
Washington, D.C.

[3] LOS ANGELES, CALIFORNIA
TUESDAY, APRIL 9, 1968, 2:00 P.M.

* * * *

[14] MR. MILLER: * * *

* * * *

[16] * * * I respectfully request the court modify the return date on the subpoena to May 15, some date in that area, with the understanding that the Sheridan firm and my firm are going to immediately approach the Department of Justice and ask them for a clarification on this matter.

* * * *

[19] MR. JOYCE: Your Honor, with respect to the question of modification of the subpoena if the subpoena is modified as Mr. Miller has requested to May 15, I would request the court set down the hearings on the motions.

THE COURT: I was going to modify it to May 22nd and set down the hearings—

MR. JOYCE: For May 15th?

THE COURT: No, not for the 15th. Assuming this goes forward how long do you think this will take?

MR. SHERIDAN: The hearing, your Honor, a couple of hours.

THE COURT: All right, Tuesday the 14th at 11:00 a.m.

[20] MR. JOYCE: The subpoena is modified until 10:00 a.m.?

THE COURT: It is modified for return on May 22, 1968 at the same time and place.

The hearing on the motion to quash the subpoena will be set for May 14, 1968 at 11:00 a.m.

* * * *

[30] LOS ANGELES, CALIFORNIA,
TUESDAY, MAY 14, 1968, 11:00 A.M.

* * * *

[50] MR. SHERIDAN: I would be asking as part of the motion, I have not personally talked with Mr. Hirschman, but I would be asking as part of the motion—certainly the Grand Jury subpoena is an order of the court through the Grand Jury. If, and if this court—there is a communication in writing from Mr. Hirschman to the best of my knowledge, which is extremely limited since I don't know the man and have never met him, he is planning on behing [*sic*] here. He has given us in the letter the date of departure as to when he intended to leave Switzerland. He has requested through Mr. Miller that a motion be made to quash the Grand Jury subpoena. I have difficulty in reading the subpoena. For whatever it is worth if this court orders the Grand Jury subpoena as it now calls for his appearance in Los Angeles on the 22nd that court order will, of course, be given to the defendant. Insofar as the Grand Jury subpoena if at all it itself is valid this court obviously has the power to continue the return date on a Grand Jury subpoena.

THE COURT: Not without the appearance of the person being subpoenaed. I do not think I could just send out a letter and say by letter we have just continued your appearance in the subpoena until some other date.

MR. JOYCE: I agree with your Honor. There [51] is no jurisdiction of the court over the person until he appears in the courtroom. I don't think there is any jurisdiction—

MR. SHERIDAN: You can modify a subpoena.

THE COURT: Yes, but I can only modify it with the people involved present. I cannot modify it without their presence or a waiver of their presence.

MR. SHERIDAN: What kind of authority—what I don't understand is it is a court order that was—

THE COURT: To appear on a particular date.

MR. SHERIDAN: Served on him in New York in the first place.

THE COURT: Personally served on him. It will take a new personal service to change that date, at least in my opinion it would.

MR. JOYCE: I agree. He would have to be personally here and in court.

THE COURT: A new personal service here, he would have to be within the court's jurisdiction for that date to be changed. That is my opinion.

MR. SHERIDAN: Doesn't he submit himself to some extent to the court's jurisdiction by authorizing us to be here to ask for a continuance to give him time to move to quash the subpoena?

THE COURT: I don't believe so, Mr. Sheridan. [52] Let us take the situation of a summons or any matter in which a defendant comes in in a criminal case and his counsel comes in on the date the defendant was supposed to appear. Counsel says my man is sick or my man is not here. The court continues the matter just on that basis without issuing a bench warrant. The date comes and the man does not appear, he is not in contempt of this court.

MR. SHERIDAN: Not unless it can be proven that it was—I convicted a man, your Honor, of failure. Judge Yankwich sentenced him. A man who was sentenced went out on appeal—this is before there was a bail jumping statute—and he was convicted of contempt of the court order remanding him into custody which was stayed by appeal. When the appeal was terminated and he went to Mexico and when we finally got him back, five years later, he was convicted. This went up on appeal and the Ninth Circuit affirmed the conviction. He was convicted on a failure, of a contempt based upon his failure to respond to the court order remanding him into custody when he was sentenced even though the order remanding him into custody was then stayed by an appeal bond.

THE COURT: You may be able to argue that at that time but—

MR. SHERIDAN: Unless he has personal [53] notice of it—

THE COURT: I am of the opinion unless there is other authority on the question of a subpoena or summons that the individual has to be before the court before anything can be changed on that summons as to the date.

MR. MILLER: If the court please, if my memory serves me right there is a Supreme Court decision, United States v. Blackmer which was decided in the late twenties or early thirties, I do not have the citation. It is my recollection that that case dealt with a subpoena and the variations that we are talking about now. The Supreme Court held—

THE COURT: We do not have to decide that matter because there is no motion. I will look at that case.

MR. MILLER: All right.

THE COURT: This matter will be continued. I think we better continue it to June 11, since I can give you more time on a Tuesday than I could on a Monday. This stands continued to June 11, 1968 at 11:00 a.m.

MR. SHERIDAN: That is the hearing on the motion, your Honor?

THE COURT: The hearing on the motion. And the matter of appearance before the Grand Jury of [54] Mr. Ryan, who has appeared in this court, will be set for June 12, 1968.

MR. JOYCE: Your Honor, I hate to ask for time but Mr. Michael and I have a trial in Columbus, Ohio on the 3rd of June. I have a Grand Jury in Alexandria, Virginia on the 12th of June. I have a trial in Toledo, Ohio on the 17th of June. I wonder if we can make it, well, we expect to be back here—

THE COURT: When do you want it?

MR. JOYCE: I would ask that it go into July.

THE COURT: July 2nd?

MR. JOYCE: Yes, your Honor.

THE COURT: All right.

MR. JOYCE: But we still have a Grand Jury sitting here on the 22nd as I understand.

THE COURT: There is nothing before me as to Mr. Hirschman.

The matter of Ryan is continued to July 2, 1968 at 11:00 a.m. The subpoena for Mr. Ryan is extended to July 3, 1968 for appearance before the Grand Jury.

MR. MILLER: If the court please, in view of the fact that records subpoenaed by affidavit on file with this court are indicated to weigh approximately a ton, [55] I wonder if the Grand Jury appearance of Mr. Ryan could be set maybe five days after the hearing. If the motion is denied then I assume—

THE COURT: You have no objection to it going to the 10th then?

MR. JOYCE: The 2nd for the hearing—

THE COURT: The 2nd for the hearing on the motion and the 10th for the Grand Jury subpoena.

MR. JOYCE: That would be fine.

THE COURT: Then the matter of Ray Ryan quashing the subpoena will be continued to July 2, 1968. The ordered appearance of Mr. Ryan before the Grand Jury will be continued to July 10, 1968 at 9:30 a.m.

MR. SHERIDAN: You did say 11:00 a.m. on July 2nd?

THE COURT: 11:00 a.m. on July 2nd.

* * * *

[63] LOS ANGELES, CALIFORNIA,
WEDNESDAY, JULY 10, 1968, 1:30 P.M.

* * * *

[75] MR. MILLER: I would say this in so far as [76] I am concerned the proper way to proceed in this case. In many of the cases cited in the memorandum which we submitted the courts have gone to the point and said that this is the proper way to do it. Through the utilization of letters rogatory that through the utilization of existing processes, such as an application by the Government itself to the registrar or the government of Kenya, that under these circumstances it could well be that these documents could be examined and in fact photocopied were they currently in Kenya. I would submit, if the court please, that in the Chase Manhattan case in the District Court decision and also in the Court

of Appeals, the court specifically pointed out where this issue of legality under foreign law was concerned that the proper way to proceed under these circumstances would be to have the Federal Government make a representation to the government of Panama and seek to obtain the records.

I am happy to see that Government counsel has in effect suggested that such a type of procedure would in fact be, should be followed in this particular case. I would think it should be followed in this case again as I mentioned before because of the very practicalities of the situation. If those records were lost in transit we would have a very difficult time convincing [77] anybody that it was not Mr. Ryan's fault. That I know and I am sure Mr. Ryan knows that. The way to avoid this physical transporting problem, the cost involved and things of that nature, would be for the Government to take such steps as is necessary under the form of letter rogatories, all this type of method which is suggested by many people that have considered this problem and utilized that method to obtain the documents rather than force an individual who voluntarily came to the United States to go back and assume this rather substantial burden. I won't dwell on the point any more except again to refer to the cases cited in the memorandum submitted to the court.

Now in addition to these factors the compliance with the subpoena would in fact be a violation of the criminal laws of Kenya.

THE COURT: Not all of it from the way I read the law of Kenya, only the books of account.

MR. MILLER: And list of members as I recall.

THE COURT: Yes, the list of members. But the books of account, that would not include correspondence.

MR. MILLER: It may well not. Basically as I understand what the Government desires in terms of records, the basic thrust of the records, the basic [78] records which it desires cannot in fact be produced without a violation of criminal laws of the state of Kenya. Here again is another reason why the suggestion that the Government made should in fact be followed because if the court please I am not an expert in the laws of Kenya.

I contacted a Mr. Devereaux who I understand is a very well known barrister or solicitor. It was his opinion, which is embodied in an affidavit which was submitted to the court. When that same type of problem has arisen the courts of the United States have without fail said that they will not require an individual subject to process of the courts of the United States to do an act that is a violation of criminal law of a foreign country. Again the cases are cited in the memorandum. That is still good law today and there is no question about it.

So consequently here again the courts have suggested, let the Government apply to the government of Kenya. For example, in the Chase Manhattan case where they suggested that a representation be made by the Government of United States to the government of Panama where the production of books and records would have resulted in a fine, I think, if done improperly. The court would not permit its processes to be used to commit an act which would be violative of the laws of a [79] foreign jurisdiction.

I have if the court desires in a more complete copy of the law of Kenya which I obtained in affidavit form from the custodian at the Library of Congress. If the court please, it might be of some help in deciding this. I would like to submit it to the record.

THE COURT: All right.

MR. JOYCE: We also have a photographic copy of the companies law of Kenya. In order to avoid any confusion maybe we should compare them before they are submitted.

THE COURT: That might be wise.

MR. MICHAEL: They both came from the same place. We endeavored to bring the book but there is only one in the entire city so the Library of Congress would not release it.

MR. MILLER: Apparently it is from the same book. I do not believe there will be any difficulty.

THE COURT: All right.

(The document was passed to the court.)

THE COURT: We will attach this to the motions.

* * * *

[92] MR. MILLER: * * *

Aside from the legal issues which I have in fact read we have the further problem as exemplified by the affidavits filed with the court. There is a question of the capability and the competency of Mr. Ryan to comply with this subpoena.

THE COURT: That aspect intrigues me as to whether or not he has custody of those documents.

MR. MILLER: It not only intrigues me, I am convinced he does not. He certainly does not have physical custody of the records. We can start off with that assumption because the records are not here, they are in Kenya. Mr. Ryan is here.

The next question is does he have the authority to order the production of the documents. And I say based on the fact that he no longer is a director of these companies, that he no longer has the authority, the requisite control factor which is required for him to direct somebody to turn records over.

Now, absent that, of course, there is no way in which he can comply with the summons, even the subpoena, assuming the court demands or suggests that [93] will not quash, in which event then, of course, it has to be complied with.

THE COURT: Isn't that a matter of appearance before the Grand Jury and testimony by Mr. Ryan before the Grand Jury that he is not the custodian of records and could not produce them?

MR. MILLER: I would think not. It seems to me this issue can be raised as presented here.

THE COURT: It is a factual issue. Certainly the law is clear he is not the custodian or does not have control of the records. There is no way he can produce them. You cannot force somebody to do something they cannot do.

MR. MILLER: That is correct. That is correct; I agree with it.

THE COURT: I wonder whether or not that has to be taken up by questions and answers and saying I am not the custodian. I don't have the records.

MR. MILLER: If the court please, I do not see any reason why it cannot be raised at this stage that the return day of the subpoena, if he comes in, and let's suppose he then really is at the point of being somewhat in jeopardy from a contempt standpoint, that is why as I understand it it is permissible under the rules to file motions in advance to quash subpoenas so that [94] there can be a prior determination without placing the individual in any type of jeopardy as to what his rights are vis-a-vis the subpoena.

THE COURT: No, but the difference is, Mr. Miller, that there is no affidavit by Mr. Ryan that he is not the custodian and does not have custody or control of these records. Isn't that the most crucial question?

MR. MILLER: If the court please, if you will examine the affidavits filed by the Federal Government supporting their opposition I think that you will find an affidavit by Mr. Ryan. * * *

* * * *

[95] MR. MILLER: If the court please, here is one of the difficulties with trying to ascertain facts and law with respect to documents located in Kenya. This again highlights the point that I was trying to make earlier that the way to proceed in this type of a matter where you have these documents would be to go to the letters rogatory and in fact take these steps which have been outlined in the various cases cited to the [96] court.

THE COURT: Mr. Joyce, why don't you want to do that?

MR. JOYCE: Your Honor, we have endeavored to use diplomatic channels. We have been informed by the State Department that the Attorney General of the government of Kenya because of his close relationship with Mr. Ryan will not permit us to utilize any of the processes of the state of Kenya to acquire the records.

MR. MILLER: If the court please, this is the first time I have heard of this. I would hope that there was some basis that we could put in the record for that statement. What you are basically saying is that the Attorney General of Kenya by reason of a personal rela-

tionship is not going to comply with whatever his duties are.

MR. JOYCE: I have just stated that exactly, Mr. Miller, that because of the relationship between Mr. Ryan and Mr. Ryan's use of whatever he used on the Attorney General, the Ambassador has informed us that there is no prospect of acquiring any cooperation from the state of Kenya.

MR. MILLER: This is news to me. I would think that the proper way to proceed under these circumstances would be to attempt—I find it hard to believe [97] that responsible Government officials are not going to do the job they are called upon to perform. I can't believe Mr. Ryan has the influence that you refer to. Maybe he has but I sincerely doubt it.

THE COURT: Why doesn't the Ambassador want to try?

MR. JOYCE: The Ambassador has tried.

THE COURT: To test the problem?

MR. JOYCE: The Ambassador has tried and we have been unsuccessful.

MR. MILLER: If the court please—

MR. JOYCE: Your Honor, he has had two meetings with the Attorney General of the government of Kenya. He has been informed that there will be no cooperation whatsoever with the United States in this proceeding.

THE COURT: Why don't you have that fellow give us an affidavit.

MR. JOYCE: The Ambassador?

THE COURT: Yes. That might answer the problem.

MR. MILLER: I would think we would be entitled to it.

MR. JOYCE: That may present a problem if it is not a sealed document and the State Department [98] is not assured that—

THE COURT: We can put it under seal of this court, there is no problem with that at all.

MR. MICHAEL: Your Honor, so far as the Ambassador, there are problems of comity and problems of relationships between the United States and Kenya. You may be aware the former Ambassador of the United

States is a man by the name of William Atwood. When he left his position as Ambassador he recently wrote a book dealing with the bureaucracy of Kenya in which he tore them to shreds.

THE COURT: We can put it under seal of the court and that will take care of any sensitivity there might be.

MR. MICHAEL: In a sense, but I am sure from our communications with the Ambassador he is not going to commit to paper after the prior problems with Kenya and the troubles of Africa that the Attorney General of Africa, who is a very close friend of the president of Kenya, is going to commit to paper under any safeguards that he may be sure of refusal to comply with a request of the United States solely because of the business interests of an American citizen in the country of Kenya. The cases cited, your Honor—

THE COURT: Let me ask you this, Mr. [99] Michael. Mr. Joyce has indicated that to this court, is that any less sensitive or more sensitive than a report by the Ambassador? He has told us what the Ambassador has said. That is part of the record, it does not have to be made public, but this writing would not be made public but should be made so that I have some basis to make a determination. If there are procedures that are open to the Government shouldn't they be required to take those procedures? Certainly we have the document, we hear it every day, exhaustion of administrative remedies, when the Government wants litigants against them to come up with procedures that are proper there are ways. If there are procedures which can be employed and are employable maybe they should be restricted to that. If they are not employable then I am sure the aid of this court can be had in taking care of that.

MR. JOYCE: Your Honor, we have in our possession on a confidential basis the State Department communications. We cannot put them into the record but will lodge them with the court at this point without getting a clearance from the State Department. We will attempt to get the clearance from the State Department to have them sealed and made a part of the record of this hearing upon the assurance that they will be sealed.

THE COURT: It will be the order of the [100] court that if any documents are filed at the request of the United States department they will be under seal for examination by the court in camera and will remain sealed until further order of the court.

* * * *

[109] MR. JOYCE: Directing your attention to the Kenya law, Kenya law requires that the books of account and all records be kept available and open for inspection by any of the directors of any of the members of the corporation. Kenya law does not prohibit the making of copies and then making of copies and making them available to foreign governments, the United States in this case. It does not make it a criminal offense for the officer or director to have complied with an order of the court producing those copies. Far from it. The thrust of the Companies Act would seem to be that all of the documents in a company in Kenya are to be kept open and available and are to be kept at least available for anyone in some instances, that is any person may get a copy of the documents by paying a fee of not more than two shillings. Certainly the directors are entitled to all of the documents and may make copies of all of the documents.

[110] I was somewhat surprised to hear the allegation that if he complied in any way he would violate the Kenya law because insofar as I was able to read the—

THE COURT: Compliance with subpoena, I take it I could order him to make copies available to you as compliance with the subpoena. But compliance of the subpoena would require the bringing of the original books, not copies.

MR. JOYCE: The compliance with the subpoena would be sufficient for purposes of this Grand Jury to have the same compliance that was permitted and directed as a matter of fact in the De Artemisa case.

THE COURT: I understand that but that was by direction of the court. The director could not on his own bring copies of the records and say this is an answer to the subpoena. The subpoena calls for the records—

MR. JOYCE: There is no—

THE COURT: In answer to the subpoena the records would have to be removed from Kenya. The books of account and a list of the members would be in violation of Kenya law.

MR. JOYCE: Only if they were done without the permission of the registrar. * * *

* * * *

[117] THE COURT: It appears that would be the date.

We have a little Washington weather for [118] you so I am going to have to keep you over until Friday morning because my inclination is, I will give you an indication and maybe you can get together to work out a procedure, I would ask you to have Mr. Ryan here on Friday morning and work out a procedure in which we would request from the government of Kenya the permission to bring the books of acount and the membership lists that are required by the subpoena or in lieu thereof work out something with the government to get copies of those documents.

As to the other documents some method of making it easier for everybody concerned can be worked out between counsel.

We will take up those matters on Friday morning. Perhaps you gentlemen can get together in the meantime and work out some sort of procedure which would be satisfactory to both you and Mr. Ryan as to how that is to be handled.

* * * *

[124] LOS ANGELES, CALIFORNIA
FRIDAY, JULY 12, 1968, 10:30 A.M.

* * * *

[127] MR. MILLER: * * *

* * * *

[130] There are as I have pointed out before in this case, I don't think—I know the cases establish the burden on the Government in a case such as this to demonstrate that they have attempted a compliance and to utilize the existing procedures. At this stage I remind the court of

the statements I made while at the bench and will go no further than that.

I would point out that there are in Kenya and in other civilized countries methods whereby foreign process can be recognized and can be utilized. I would respectfully suggest to the court in view of the fact that the witness is obviously a target of the Grand Jury [131] proceeding which is looking to indict him and, secondly, that there are witnesses who are directors and officers of this corporation including the president who is currently on his way to the club that it is these, shall I say, nontargets who should be required to produce the records and appear before the Grand Jury rather than one who has demonstrated that he does not have custody and control.

I would again point out to the court that the subpoena itself has substantial complications in terms of compliance. It is obviously partially a violation of Kenya law and may be more than that. It requires something that is of great physical effort, moving 2,000 pounds of original documents from Kenya to here. Other courts passing on this have said they would not require a witness to undertake such a magnitude in terms of not only the amount of documents but also in the hauling of documents halfway around the world. On all these bases, if the court please, it seems to me that the subpoena is unreasonable, oppressive and for the reasons earlier stated in my motion should be quashed.

* * * *

[145] THE COURT: You gentlemen can't seem to get together on anything. I might tell you what basically the feeling of the court is at the present time. I have started to write something down in terms of an order of what I was going to pose and that is.

> "Court finds that petitioner Raymond J. Ryan at times before and after commencement of the investigation by the Treasury Department and Department of Justice has had control of the records, papers and couments [*sic*] pertaining to the operation of Ryan Investment, Ltd., Nairobi, Kenya, Mawingo, Ltd., Nanyuki and Nairoby [*sic*], Kenya doing busi-

ness as Mount Kenya Safari Club, Nanyuki and Nairobi, Kenya.

[146] "That pursuant to the agreement of counsel for Raymond J. Ryan and Raymond J. Ryan personally that agents of the Department of Justice and/or the Treasury Department may inspect and make copies of any books, records, papers and documents referred to in the subpoena served upon petitioner Raymond J. Ryan for appearance before the Grand Jury, Central District of California on 15 April 1968 at 10:00 o'clock a.m."

I was going to ask you to possibly elicit the agreement based upon an agreement which has been offered:

"That pursuant to agreement of counsel for Raymond J. Ryan and Raymond J. Ryan personally any copies of books, records, papers and documents made by agents of the Department of Justice and/or Treasury Department may be deemed used in lieu of any originals thereof in the same manner as originals subject only to objections to admissibility on grounds other than foundation or authentication."

MR. JOYCE: That would be satisfactory with the Government.

MR. MILLER: If I understand the court, what you are asking is that we waive the best evidence rule; is that it?

THE COURT: Yes. In other words, foundation [147] and authentication of documents of which they make copies.

MR. MILLER: It is a very difficult decision for me to make, never having seen these records. I just don't think in good conscience, representing Mr. Ryan, that I could in fact consent to that because I have not seen the documents. I do not know what is contained in the documents.

THE COURT: I guess we could order Mr. Ryan. The question of making copies or of viewing the books, records, papers and documents called for in the subpoena then require Mr. Ryan to use his best efforts of the

registrar or companies in Kenya to release those originals for us for use in the United States when they become necessary to be used.

MR. MILLER: We would have no objection to sending whatever was necessary requesting the registrar to do so.

THE COURT: In the meantime do you have any objection to them making copies of those books, records and papers?

MR. MILLER: We are willing, Mr. Ryan is willing to execute whatever may be necessary addressed to the registrar with respect—

THE COURT: I am talking about in reference to the companies, making available the books, records in Kenya for copy by the Government agents and then [148] should it be required further that you make application to the registrar of companies for the removal of the original documents, records and papers which are within the Kenyan law, that is, the books of account and the list of members which are the only ones. I take it the others can be removed without any question.

MR. MILLER: I can state to the court now that we are willing to make such application, without attemping to hedge or appear to, provided there is not some good basis for the objection.

THE COURT: I am not having you waive all objections but only objections as to foundation or authentication. They are records in the business of Ryan Investment Company. I assume they have been kept in the normal course of that business and would be admissible in that event just as to foundation. They might be objectionable on other grounds.

MR. MILLER: Yes, I see. That is what I was attempting to find out and clarify.

THE COURT: No, only the ground of foundation and authentication that these are books and records of the companies from which they appear to originate and they are kept in the normal course of business of these various companies.

MR. MILLER: We would certainly make such [149] application.

I can state I am quite sure Mr. Ryan cannot authenticate these books but if he can he will do so.

MR. JOYCE: We are not having Mr. Ryan authenticate them.

THE COURT: No.

How much time do you think you need for that, Mr. Joyce?

MR. JOYCE: To make the copies?

THE COURT: Yes, to do what you have to.

MR. JOYCE: Probably not over three weeks, your Honor. We had tentatively scheduled the Grand Jury to meet on the 24th of July.

THE COURT: Then to continue the appearance of Mr. Ryan to some time in September, and if you have got what you wanted there is no need to call him to authenticate records which is all he could do basically before the Grand Jury. His appearance would not be necessary if the attorneys for the Government and his attorney can stipulate that those records are such that foundation or authentication can be waived.

MR. MILLER: I missed that, if the court please.

THE COURT: We will continue now the appearance of Mr. Ryan to some time in September with the [150] understanding and the proviso in the order that his appearance would not be necessary if the stipulation were filed with the court between counsel indicating that his appearance was not necessary for the purpose of authentication or foundational questions as to records kept in the normal course of business of that company.

MR. JOYCE: Insofar as the procedure and the details we expect the copying would be done at the United States Embassy in Nairobi by agents of the U.S.

THE COURT: You cannot remove them from Kenya but you can move them around Kenya?

MR. JOYCE: They will be brought to Nairobi and copied there, wherever they are.

THE COURT: That procedure you can work out. It would be in keeping with the cases.

Do you gentlemen want to do this? Do you want to draw an order with respect to what the court has indicated and bring it down this afternoon for the court to

sign while Mr. Ryan is here so that I can personally order him back in September also?

MR. JOYCE: All right, your Honor.

We will go to the United States Attorney's office and prepare the document with Mr. Miller.

MR. MILLER: If the court please, I wonder if we could pick a date now and let Mr. Joyce and I work [151] out the order in Washington. We can order him because every time he has been ordered he has reappeared.

MR. JOYCE: It is my understanding that he will be ordered to produce the documents for inspection and copying by the United States.

THE COURT: Yes.

MR. MILLER: We can have him back were such an order drafted. I am not sure we can put it out this afternoon in a satisfactory way.

THE COURT: We can order him back next week. If the order is drawn, Mr. Joyce, you do not have to be here because I can order him back without the presence of Government counsel.

MR. MILLER: If the court please, could we do this? Could we leave it at this posture: Mr. Joyce and I will attempt to work out a proposed order. If we cannot come together we will each submit one and that once that has been accomplished if you will notify me we will have Mr. Ryan present in the courtroom and you can direct him with respect to the order.

THE COURT: This should give us enough time. I will order him back on July 22nd, 1968 at 2:00 p.m.

MR. JOYCE: Well, the Grand Jury will meet on the 24th in any event.

MR. MILLER: May I request that it be the [152] 24th then because Miss Hansen has been called.

THE COURT: The 24th at 10:00 a.m.

Mr. Ryan, you are to return to this court on July 24th, 1968 at 10:00 a.m. for further consideration of the matter of your appearance before the Grand Jury. Do you understand that?

THE WITNESS RYAN: Yes, sir.

THE COURT: With the proviso set forth by the court in its oral order and the order that will be sub-

mitted in writing by counsel the motion at this juncture is denied without prejudice to the petitioner Raymond John Ryan. I take it you will bear the responsibility, Mr. Joyce, of preparing the order. I will give you my written notes.

MR. JOYCE: Yes, your Honor, if there is an agreed order sent out to the United States Attorney's office.

THE COURT: Restrict it to the companies as I have because the findings can go only to those companies. I don't have any evidence about Zimmerman and 7-Up Bottling Company.

MR. MILLER: If the court please, it would be tremendously helpful if we could have a copy of the transcript. I know it is probably an unreasonable request but we would like to ask if at all possible that [153] we could have a transcript.

THE COURT: The reporter can get out those portions this afternoon. The reporter will just have transcribed those parts with reference to the order.

I still have the matter of Mr. Gorman's appearance.

MR. JOYCE: May I be excused? Mr. Michael will handle the Gorman matter while I go up to get Xerox copies of the court's notes.

THE COURT: Yes.

* * * *

[194] LOS ANGELES, CALIFORNIA,
THURSDAY, JULY 25, 1968, 10:00 A.M.

* * * *

[223] THE COURT: You prepared an order with reference to these records.

MR. MICHAEL: That is right, your Honor.

THE COURT: I don't think this is what I discussed with you gentlemen, I don't think this is what I had discussed at that time.

It was my understanding it was the order of the court that Mr. Ryan would make the records available. He would make all the records available in [224] Kenya for copying by agents of the Grand Jury so that those matters could be brought to the United States and presented to the Grand Jury.

The question was whether or not you gentlemen could get together on a stipulation of authenticity.

MR. MICHAEL: Your Honor, it is perfectly agreeable to the Government, and that is what our order was attempting to reflect. The only differences between what I feel the Government proposed in this order and what the court's order suggested was upon agreement of counsel. Mr. Miller and I discussed it. He prepared a contrary order which he submitted to me. I understand he has not submitted that to the court. He understood there was a proposed order which we were submitting of which he was given a copy a week ago today. The Government is perfectly agreeable to have Mr. Ryan being ordered to make available the records in Kenya for copying by agents of the United States Government. The only exception was the court did make reference to certain documents which need not be maintained within Kenya. It was included in the Government's order.

THE COURT: In the event that you cannot reach a stipulation as to authenticity then the court would order that these documents would be brought and that [225] he make application as to the others.

MR. MICHAEL: I have no idea what Mr. Miller's position on authenticity is. Certainly so far as the Government is concerned the copying in Kenya is perfectly adequate. The originals need not be produced within the United States.

As the court point out solely on the grounds of authenticity and the foundation—

MR. MILLER: If the court please. I did in fact prepare a proposed order which I submitted to Mr. Michael which was substantially different from the order which the Government submitted. Frankly, after discussing it back and forth we have decided we were so far apart that further discussion would in fact be fruitless.

If it please the court, I, of course, feel for the reasons we have already stated, I am not going to go into them now because the court has fully heard me on this, that the order itself is in effect beyond the jurisdiction of the Grand Jury. I have made all these points before and I will not take the court's time and go into them again. I

just feel that the order prepared by the Government is one which just cannot be sustained and consequently I respectfully object to its entry. I feel I can do no more.

[226] MR. MICHAEL: I don't understand what Mr. Miller's position is on the authenticity either.

MR. MILLER: I made the statement the last time and I will repeat it to the court. So far as I am concerned I do not believe that it is possible for my client to authenticate those records. I just don't think he has the knowledge or the capability of authenticating the records. Therefore they could not possibly stipulate that he will do so because he would in effect be committing perjury in authenticating the records.

* * * *

[228] THE COURT: We will make it September 11, that is two weeks before the appearance proposed of Mr. Hirschman.

Mr. Gorman, Mr. Ryan, you are to appear before the Grand Jury on September 11, 1968 at 9:30 a.m.; do you understand that?

MR. RYAN: Yes, sir.

THE COURT: Mr. Gorman, do you understand that?

MR. GORMAN: Yes.

THE COURT: Will you reprepare the order that I have made some corrections in.

MR. MICHAEL: Does the order indicate exactly where in Kenya? We suggested earlier the American Embassy. We discussed that with Mr. Miller. That would be in Nairobi and there is a copying machine there.

THE COURT: They are not agreeing to that procedure. He has been ordered to bring the records here in the order.

MR. MICHAEL: I see.

THE COURT: The order will be also, Mr. Ryan, that you produce with the exception of the books of account, the minute books and list of members before the Grand Jury on September 11, the books, records, papers [229] and documents of Ryan Investment, Ltd. of Nairobi, Kenya and Mawingo, Ltd. of Nanyuki and Nairobi, Kenya, doing business as the Mount Kenya Safari Club. You shall also forthwith make application to the registrar

of companies in Kenya to release the books of account, minute books and list of members so that you may produce these books, records, papers and documents at the Federal Grand Jury on September 11, 1968. Failing your ability to get the consent of the registrar of companies in Kenya to release such books for presentation you will make available to agents of the United States Department of Justice and/or the United States Department of Treasury the books of account, minute books and list of members of Ryan Investment, Ltd. and Mawingo, Ltd. as set forth above so these agents may inspect and make such copies of these books in Kenya.

MR. RYAN: Yes, sir.

THE COURT: Will you prepare the order?

MR. MICHAEL: Yes, sir.

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[Transcript, Vol. 1]

[75]

[Filed July 25, 1968]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Misc. No. 1926

COURT'S ORDER

IN THE MATTER OF THE GRAND JURY SUBPOENA DUCES TECUM OF THE WITNESS, RAYMOND J. RYAN

The witness Raymond J. Ryan was served with a grand jury subpoena on March 5, 1968, requiring his appearance before the grand jury on April 15, 1968, and the production of various corporate documents.

Pursuant to motion to quash the subpoena duces tecum filed by the said witness his grand jury appearance was ordered continued to a future date.

Hearings on the motion to quash were held, and the Court finds that the petitioner Raymond J. Ryan at times before and after commencement of the investigation by the Treasury Department and Department of Justice has had control of the records, papers, and documents referred to by the subpoena duces tecum which pertain to the operation of Ryan Investment, Ltd., of Nairobi, Kenya, and Mawingo, Ltd., of Nanyuki and Nairobi, Kenya, doing business as The Mount Kenya Safari Club of Kenya.

[76]

WHEREFORE, IT IS ORDERED THAT:

I. The motion of Raymond J. Ryan to quash the subpoena duces tecum is denied.

II. Raymond J. Ryan will produce, with the exception of the books of account, minute books and the list of mem-

bers, before the Federal grand jury at Los Angeles, California, on September 11, 1968, the books, records, papers and documents of Ryan Investment, Ltd., of Nairobi, Kenya, and Mawingo, Ltd., of Nanyuki and Nairobi, Kenya, doing business as The Mount Kenya Safari Club, referred to in the April 15, 1968, subpoena duces tecum served on Raymond J. Ryan.

III. Raymond J. Ryan shall forthwith make application to the Registrar of Companies in Kenya to release the books of account, minute books, and list of members so that Raymond J. Ryan may produce these books, records, papers and documents at the Federal grand jury held at Los Angeles, California, on September 11, 1968, provided that if Raymond J. Ryan is unable to secure the consent of the Registrar of Companies of Kenya, then Raymond J. Ryan will make available to agents of the United States Department of Justice and/or the United States Department of the Treasury the books of account, minute books, and list of members, of Ryan Investment, Ltd., and Mawingo, Ltd., and these agents may inspect and make copies of these books and records.

/s/ Manuel L. Real
MANUEL L. REAL
United States District Judge

[77]

[Filed Aug. 5, 1968]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Misc. No. 1926

NOTICE OF APPEAL

IN THE MATTER OF THE GRAND JURY SUBPOENA DUCES TECUM OF THE WITNESS, RAYMOND J. RYAN

Notice is hereby given that RAYMOND J. RYAN, witness before the grand jury in and for the Central District of California, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain order filed 25 July 1968 and signed by the Hon. Manuel L. Real, United States District Judge, a true copy of which is annexed hereto and incorporated herein by this reference, and from every portion thereof.

Dated: 5 August 1968.

MILLER, MCCARTHY, CASSIDY & LARROCA

By: Herbert J. Miller
HERBERT J. MILLER

* * * *

[Transcript, Vol. 4]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Honorable Manuel L. Real, Judge Presiding

Misc. 1926

IN THE MATTER OF RAYMOND JOHN RYAN,

No. 2961—Criminal

UNITED STATES OF AMERICA, PLAINTIFF,

v.

RAYMOND JOHN RYAN, DEFENDANT.

* * * *

[3] LOS ANGELES, CALIFORNIA,
TUESDAY, DECEMBER 2, 1969, 10:00 A.M.

* * * *

THE COURT: Since we haven't done it previously I wonder if you gentlemen might enlighten the court to what was filed in the Court of Appeals.

MR. MILLER: I would be happy to.

If the court please, on October 8, 1969, I prepared a letter and sent to the United States Court of Appeals for the Ninth Circuit, Appeal No. 23343, styled In the Matter of the Grand Jury Subpoena of Raymond J. Ryan, Appellant, a pleading entitled Motion for Order in Aid of Court's Appellate Jurisdiction. This pleading, copies of which I have here, was served upon William Matthew Byrne, Philip R. Michael, Gerald D. McDowell of the Criminal Division.

Following the filing of the motion the Government filed a response which was received in our office [4] on October 14, 1969. In the response the Government op-

posed appellant's motion to stay the District Court proceeding. It was signed by Edward T. Joyce and Philip R. Michael's name was on the pleading.

Subsequent thereto on October 20 the Court of Appeals entered an order in which, among other things, they directed that the order of the court was scheduled on December 2, 1969, date for commencement of the trial of the said District Court cause in No. 2961—Criminal, it should be stayed and the same hereby is vacated. The trial of the said District Court cause will be continued pending this court's disposition of the subject appeal or until further order of this court. I have, for the record, I will submit to the clerk, a certified copy of that order. As I said, the order was entered October 20, 1969. There was no appeal pending in the Court of Appeals as I knew and as the Government knew from District Court cause No. 2961—Criminal. However, in view of the fact that the Government filed no motion to clarify and took no step to clarify the order, I assumed as in fact did the Government that since the two cases had been consolidated that the trial date had in fact been vacated and put over.

In the motion that we filed with the court our entire pleading was directed to the appeal in the [5] criminal contempt case and had no relation whatsoever to the charge involved in criminal case No. 2961—Criminal. I feel then, now and before as of October 20 had the Government desired to make some motion to sever this case to clarify the order of the United States Court of Appeals for the Ninth Circut they could have done so.

* * * *

[9] THE COURT: It would seem to me as officers of the court both counsel for defendant and the Government had the duty to notify the court that they had made an error, that their order was without jurisdiction.

MR. MILLER: If the court please, I would respectfully disagree with the court on that for this basic reason. The two cases were consolidated for trial. I assumed if one were stayed—

THE COURT: That does not consolidate the cases for the nature of the appeal that is before the appellate

court and does not give the appellate court jurisdiction in case No. 2961. If that case goes up at all it has to go up on a writ of prohibition, that is the only jurisdictional way that case can get before the Court of Appeals.

MR. MILLER: I agree with the court.

THE COURT: The order of consolidation does not give the Court of Appeals jurisdiction over case 2961.

MR. MILLER: And we made no representations in the Court of Appeals that any of our motions were [10] directed to civil cause No. —

THE COURT: I am telling you as an officer of the court it was the duty of counsel to notify the court that they had made an error when that error is so obvious.

MR. MILLER: If the court please, in view of the fact that the two cases had been consolidated for trial and it had been the position of the United States Government, or at least counsel for the United States Government, that the cases should go to trial together that regardless of what the Court of Appeals order said I assumed if one were stayed the Government would not desire to proceed with the other.

THE COURT: What I am telling you, Mr. Miller, is that the Government does not set the calendar of this court.

MR. MILLER: I agree with that.

THE COURT: Their only alternative, if they didn't want to proceed, is to dismiss the matter because this court sets its calendar.

MR. MILLER: If the court please, if the Government desired to proceed then I assumed that they would have filed an order of clarification with the Court of Appeals and with that accomplished the whole matter would have been right back where it was. The only stay [11] was in the contempt case. If the two cases were not consolidated then it would be a different matter but they were in fact consolidated.

THE COURT: But that does not give the Court of Appeals jurisdiction and you know that.

MR. MILLER: I am not arguing that it does. I admit the Court of Appeals did not have jurisdiction of any

appeal in 2961—Criminal because I did not file any notice of appeal nor pleadings.

THE COURT: Then why didn't you advise the Court of Appeals they had made an error that their order was without jurisdiction.

MR. MILLER: Because I did not believe it was material since the Government felt that they wanted to try the two cases together. So far as I was concerned the error was immaterial. The prime point, the main point was that one of the two cases had been stayed and once that was the case and assuming, as I did on the basis of the prior statements of Government counsel, they wanted these two cases tried together. I assumed the fact that they put the wrong number in the order was totally immaterial. I think that is the fact, if the court please.

THE COURT: Now, Mr. Joyce, I want to hear from you why you did not notify the Court of Appeals.

[12] MR. JOYCE: First of all, your Honor, we never received a copy of the order. We never received a copy of the order of the Court of Appeals and were operating by—

THE COURT: Mr. Joyce, don't tell me that because a copy of the order was given to me by the United States Attorney with a stamp on it, "Received October 22nd."

MR. JOYCE: I am saying that we did not, your Honor, we did not in the department—

THE COURT: Who is "we"?

MR. JOYCE: In the Department of Justice.

THE COURT: Is the Department of Justice a different government than the United States Attorney?

MR. JOYCE: No, your Honor, it is not a different government.

THE COURT: You are the same party and when you appear in this district you appear through the aus [*sic*] offices of the United States Attorney in this district. You just better find out what is going on when you have cases which are involved here.

MR. JOYCE: We were informed that the trial date had been set aside and assumed that the trial date for both cases had been set aside. We did not analyze this

situation to come to the conclusion that there had [13] been an error in the Court of Appeals and just went on the assumption that there was no trial date for either of the consolidated counts. We had planned as soon as the trial calendars of Mr. Michael and myself were cleared to move for a severance because there is no way of knowing when that contempt appeal will be finished.

As I said, we had plans to move for severance and go to trial on the instruction but Mr. Michael is currently engaged and I have a trial starting on Monday which will take the rest of the month. We wanted to make sure our motions were compatible with our availability for trial.

THE COURT: I think both of you owe the court the courtesy of at least advising the court what is going on in this lawsuit.

MR. JOYCE: Your Honor, I apologize.

THE COURT: Both of you failed in that courtesy.

MR. JOYCE: For any lack of courtesy on our part on behalf of the United States I apolize to the court. There was no intentional discourtesy. I do apologize for the lack of foresight in realizing that this situation had come about.

THE COURT: The court takes judicial notice that there is no case No. 2961 pending before the Court of [14] Appeals. The only case before the Court of Appeals is case No. 1926-Miscellaneous on appeal argued May 14, 1969, not yet decided. Case No. 2961 is now set for trial on January 6, 1970, at 9:30 a.m. The case will go to trial then.

MR. JOYCE: Thank you.

THE COURT: If case 1926 has been decided by that time it will also go to trial.

We deem that the stay order is in case 1926 and not in case 2961.

* * * *

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 23,343

IN THE MATTER OF THE GRAND JURY SUBPOENA DUCES TECUM OF RAYMOND J. RYAN, *Appellant.*

[May 19, 1970]

Appeal from an Order of the United States District Court for the Central District of California

---

Before: JERTBERG, MERRILL, and ELY, Circuit Judges.

PER CURIAM:

This appeal is from an Order of the District Court denying appellant's motion to quash a subpoena duces tecum, ordering him to produce most of the documents called for by the subpoena and requiring affirmative action in relation to other documents. Ryan presents several important contentions in this court, including persuasive arguments grounded in constitutional law. We have concluded that we need not reselve all of these issues, having finally become convinced that the Order is vague and overly broad.

Ryan, an American citizen, has been under investigation for tax evasion for several years. The aspect of the investigation with which we are dealing concerns several African businesses of which Ryan is apparently the principal shareholder. He was subpoenaed by the Grand Jury of the Central District of California and ordered to bring with him "all books, records, papers, and documents" pertaining to five different companies, all located in Kenya. Ryan moved to quash the subpoena on the grounds, among others, that it was overly broad, that it was served improperly, and that full compliance with it would require

him to violate Kenya law. The District Court denied the motion to quash and entered the Order from which Ryan appeals.

The Government contends that we have no jurisdiction to entertain the appeal, arguing that the Order is nothing more than an interlocutory order in a criminal proceeding. Several cases are cited in support of this contention. *Cobbledick* v. *United States*, 309 U.S. 323, 84 L. Ed. 783, 60 Sup. Ct. 540 (1940); *In re Grand Jury Investigation*, 318 F.2d 533 (2d Cir. 1963); *In re Buckey*, 395 F.2d 385 (6th Cir. 1968). In none of the cases cited, however, had the District Court ordered anything other than compliance with the subpoena. In contrast, the District Court here modified the subpoena with respect to certain documents and directed the appellant to undertake steps in a foreign country to have those documents released by other persons for transportation to this country or for inspection in Kenya by United States agents. In directing that affirmative action be taken in another country, the District Court did more than deny a motion to quash; it in effect granted a mandatory injunction which, given full effect, would require action by officials of the Kenyan Government. *See International Longshoremen's Assn.* v. *Philadelphia Marine Trade Assn.*, 389 U.S. 64, 19 L. Ed. 2d 236, 88 Sup. Ct. 201 (1968). We therefore conclude, in the particular circumstances of this case, that we should hold the Order to be appealable under 28 U.S.C. § 1292 (a) (1). *See Continental Oil Co.* v. *United States*, 330 F.2d 347 (9th Cir. 1964). *Cf. Lampman* v. *United States Dist. Ct.*, 418 F.2d 215 (9th Cir. 1969).[1]

As an injunction, the Order is defective in not stating with sufficient particularity what Ryan was expected to do. Moreover, it is oppressive in scope, it being said without contradiction that Ryan's compliance would require him to transport 2000 pounds of records at his own expense from Kenya. The challenged Order incorporated

[1] In *Lampman*, the sole challenge to the subpoena was based on action allegedly conflicting with Internal Revenue Service administrative procedures. While we held the Order in *Lampman* was not appealable, that Order cannot be fairly compared, in breadth, reach, or overseas effect, to the one that is now before us.

by reference the subpoena, which had called for all records of the five businesses "including but not limited to checkbooks, books of accounting, disbursement journals, and any and all correspondence relating to these five entities, as well as records, books, papers, documents, and correspondence relating to the application of the currency control regulations and the foreign investments protection act of Kenya to these five" companies. The Government conceded that the subpoena itself was overly broad, but the District Court did not undertake to clarify it or to limit it, except to remove only a few documents from its attempted operation. As to those excepted documents, the Order required affirmative action on the part of Ryan that, arguably, would require him to violate the law of Kenya. Finally, we note that the need for the subpoena, or an injunction, could have been obviated by the use of letters rogatory. The District Court refused to require this approach because of information presented to the court *in camera* and not disclosed to Ryan or his counsel. This information purportedly related to Ryan's improper influence upon the Attorney General of Kenya. On the record before us, we cannot accept the insinuation that the authorities of a friendly foreign power are subject to corruption. We were informed on oral argument that letters rogatory are now being pursued by the Government, and we have no reason to doubt that the Kenyan Government and its officials will respond in a manner consistent with their jurisprudential heritage.

Reversed.

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 23343

IN THE MATTER OF THE GRAND JURY SUBPOENA DUCES TECUM OF RAYMOND J. RYAN, APPELLANT

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

Filed and entered May 19, 1970.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Wednesday, July 29, 1970

Before: JERTBERG, MERRILL and ELY, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED That the petition of the United States of America filed June 29, 1970 and within time allowed therefor, and valid extension thereof, by rule of Court, for a rehearing of above cause be, and hereby is denied, and the suggestion for a rehearing en banc is rejected.

Monday, January 18, 1971

SUPREME COURT OF THE UNITED STATES

CERTIORARI GRANTED

No. 758. United States, petitioner, *v.* Raymond J. Ryan. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 417705 934

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND J. RYAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The opinion of the court of appeals (Appendix A, *infra*) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1970. (App. B, *infra*). A petition for rehearing with suggestion for rehearing en banc was denied on July 29, 1970. (App. C, *infra*). On September 2, 1970, in response to the government's motion filed on August 28, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to Sunday, September 27, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's order denying respondent's motion to quash a federal grand jury subpoena to produce records maintained under his control in a foreign country and directing respondent to apply to the foreign government for permission to produce some of those records was an appealable order.

STATEMENT

On March 5, 1968, a federal grand jury in the Central District of California issued a subpoena duces tecum directing respondent Ryan to produce the books, records, papers and documents of five companies doing business in Kenya, controlled and principally owned by Ryan. He produced those records which he had stored at Palm Springs, California, but filed a motion to quash the subpoena as to the remainder, claiming that he had no control over them, that the subpoena was overly broad, and that compliance would compel him to violate a Kenya law prohibiting the removal from Kenya of corporate "books of account, minute books and lists of members" without the consent of the Registrar of Companies of Kenya.

After a hearing, the district judge found that Ryan had control of the records, papers and documents of some of the companies, doing business as the Mount Kenya Safari Club. It denied the motion to quash as to these records [1] and, on July 25, 1968, ordered Ryan

[1] The evidence at the hearing showed that Ryan and two associates purchased the Mount Kenya Safari Club in 1959. He became an officer and director of this Club. In 1961, he organized Ryan Investment, Inc., and became an officer and director,

to produce them in September of 1968. It made an exception, however, as to the books of account, minutes books and list of members. The order directed Ryan to apply to the Registrar of Companies in Kenya for permission to release these books so that they could be produced; if permission was denied, Ryan was to make the records available to United States government agents in Kenya for inspection and copying there (Appendix D, *infra*). The judge offered to include in his order a government proposal to relieve Ryan of travelling to Kenya to get the records (claimed by Ryan to weigh some 2000 pounds) by sending federal agents there to inspect and copy them. Ryan declined these offers (Tr. July 10, 1968, pp. 76, 110, 118; July 12, 1968, pp. 146, 151; July 25, 1968, pp. 224–225).

Following the district court's determination, and the filing of a notice of appeal, Ryan sought both extraordinary relief in the court of appeals to prohibit enforcement of the district court's order, and a stay of proceedings. After oral argument, the court of appeals denied both the extraordinary relief and a

owing 98% of the stock. Records which these companies filed with the Kenya government and the prior testimony of Ryan's associate showed that Ryan retained *de facto* control of these corporations after March 5, 1968, when the subpoena was served, although he had nominally resigned his directorship. In particular, Ryan's associate testified before the grand jury that Ryan's two partners deferred to him in operation of the Kenya enterprises and that Ryan maintained control of the corporate books sought by the subpoena. It was shown also that Kenya law provides that a director "includes any person occupying the position of director by whatever name called" (Statutes of Kenya, Companies Act, Chapter 486, Part 1(1)).

stay of proceedings (Appendix E, *infra*);[2] the appeal itself, however, remained pending.

Ryan then appeared before the federal jury as ordered, but otherwise refused to comply with the district court's order. He neither produced the required records not subject to Kenya law, nor made any application to Kenya authorities for release of the matters protected from removal by Kenya law, nor permitted government agents to examine any records in Kenya. The district court issued an order requiring Ryan to show cause why he should not be held in civil contempt for this conduct. In connection with this proceeding, the court allowed Ryan to issue letters rogatory to two witnesses in Kenya claimed to be necessary to his defense. When the grand jury term expired, this show cause order was converted into an order to show cause why Ryan should not be punished for criminal contempt. The court of appeals, however, stayed the criminal contempt charge pending the appeal from the district court's action on the subpoena, and also stayed Ryan's trial on a charge of obstructing justice (18 U.S.C. 1503) by falsification of certain records which Ryan had initially produced in response to the subpoena duces tecum.[3]

It was not until May 19, 1970, that the court of appeals finally rendered its decision "reversing" the district court's order of July 25, 1968. Although the effect of the district court's order had been to relieve Ryan of some of the burdens of the subpoena itself,

[2] Ryan applied to the Circuit Justice, who also refused to stay the proceedings.

[3] Subsequest to the court of appeals' decision in this case, Ryan was tried and convicted on the obstruction charge.

the court of appeals held that, since it directed affirmative action in Kenya as to some of the records, it "did more than deny a motion to quash; it in effect granted a mandatory injunction which, given full effect, would require action by officials of the Kenyan government." (Appendix A, *infra*, p. 14). Because it was able to characterize that part of the district court's order as an injunction, the court concluded that the whole was appealable as an injunction under 28 U.S.C. 1292(a)(1). Treated as an injunction, the court found that the order was defective in not stating with sufficient particularity what Ryan was expected to do. It also found the order oppressive and overbroad and said that the need for a subpoena could have been obviated by use of letters rogatory.[4]

REASONS FOR GRANTING THE WRIT

The decision below is a substantial departure from the principle of *Cobbledick* v. *United States*, 309 U.S. 323, that, because grand jury investigations are part of the criminal judicial process,[5] district court orders denying motions to quash grand jury subpoenas may not be appealed. Both in terms of the time taken for appeal and the attendant disruption of judicial process, this case exemplifies this Court's observation in *Cobbledick* that "encouragement of delay is fatal to

[4] The court's statement in its opinion that "letters rogatory are now being pursued by the Government" is incorrect and apparently resulted from a misunderstanding of something said during the oral argument. The only letters rogatory relating to the present case are those of respondent Ryan.

[5] See Douglas, J., dissenting in *Hannah* v. *Larche*, 363 U.S. 420, 497–499, for a summary of the role of the grand jury in the American system of justice.

the vindication of the criminal law." 309 U.S. at 325. And the decision below is in square conflict with the refusal of the United States Court of Appeals for the Second Circuit to entertain appeals from functionally identical district court orders auxiliary to grand jury subpoenas.

1. Had the district court simply refused to quash the subpoena in this case, Ryan would have been required to produce all the stated matter in California on the return date, subject to the sanctions of contempt if he failed to do so. That action would not have been appealable.

> * * * The Constitution itself makes the grand jury a part of the judicial process. * * * The proceeding before a grand jury constitutes "a judicial inquiry" * * * of the most ancient lineage. * * * The duration of its life, frequently short, is limited by statute. It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the "orderly progress" of investigation should no more be encouraged in one case than in the other. That a grand jury proceeding has no defined litigants and that none may emerge from it, is irrelevant to the issue. The witness' relation to the inquiry is no different in a grand jury proceeding than [in a criminal trial]. Whatever right he may have requires no further protection in either case than that afforded by the district court until the witness chooses to disobey and is committed for contempt. * * * At that point

> the witness' situation becomes so severed from the main proceeding as to permit an appeal. * * *.

Cobbledick, supra, 309 U.S. at 327–328; see also *Di-Bella* v. *United States,* 369 U.S. 121, 124; *Will* v. *United States,* 389 U.S. 90, 96.

Nothing the district court did here "so severed [Ryan's situation] from the main proceeding as to permit an appeal." Its order, limited to material the grand jury subpoena had required Ryan to produce, simply carried the subpoena forward as to that material not protected by Kenya law;[6] as to the rest, it merely specified a procedure which would permit transmittal to occur in Kenya if permission to remove it could not be obtained. Thus, the specified procedure was fully within the purview of the grand jury's subpoena, and strictly in aid of it.

It is inherent in any subpoena duces tecum that the person required to produce the records take affirmative steps to assure their production. Thus, there is no special significance in the simple fact that the records here sought by the grand jury were maintained outside the United States. Nor does the fact that the judge ordered the respondent to apply to the government of Kenya for permission to remove some of the records change the essential nature of the order—even as to them—as one denying a motion to quash. If a corporation had books in a warehouse which were subpoenaed the subpoena would require it to get the books out of the warehouse. Sometimes,

[6] To the extent the court's order called for production of materials other than "books of account, minute books, and the list of members," *supra*, pp. 2–3, no action by or before Kenya officials was required.

as where the individual involved is not the sole or actual custodian of the records, considerable efforts may be necessary in order to achieve good faith compliance. See, *e.g.*, *United States* v. *Fleischman*, 339 U.S. 349, where the Court held that the subpoenaed members of an executive board of an association, who had power acting ex officio to direct release of the subpoenaed records by another officer in whose custody they were, were required to meet and issue such an order.[7] The fact that efforts to obtain demanded records must be made on foreign rather than domestic soil is hardly a viable basis for distinguishing in terms of appealability among the two situations. Nor, assuming the court intended to rely thereon, is the assertion that the records as to which no foreign permission was necessary weigh 2,000 pounds rather than a lesser amount. Both the government and the court, faced with a claim of hardship, offered to minimize inconvenience by arranging for inspection in Kenya—an offer consistently rejected by respondent.[8]

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[7] *Fleischman* did not involve a grand jury subpoena and no question was involved as to the appealability of a denial of a motion to quash. We merely use the example as illustrative of a situation which could well arise in the present context and as to which, we submit, the district court's order refusing to quash would not be appealable merely because a more than ordinary degree of affirmative action was required for compliance.

[8] While our chief concern as a matter of general application is the question of appealability, the court below was, we submit, clearly in error in holding the subpoena vague or oppressive. The companies involved had been in existence only since 1959, so that there was no vagueness as to the time period involved. As to the records which, under Kenya laws, could not be transported without permission, the direction to seek permission and, if denied, to permit inspection by United States agents in

Here, then, as in the case of any subpoena or other order in aid of a grand jury's investigations, "[e]very consideration relating to piecemeal litigation and delay of Grand Jury proceedings" fully applies. *Lampman* v. *United States District Court*, 418 F. 2d 215, 217 (C.A. 9). Here, as there, the person subject to the order has an adequate remedy through a defense to proceedings against him for contempt in the event of his noncompliance, and appeal from any conviction or order of civil commitment. Yet, simply by labelling the district court's order a "mandatory injunction," the Ninth Circuit has found its way around the clear mandate of this Court's cases that criminal processes are not to be delayed by interlocutory appeals. Such reasoning, depending as it does on uncertain issues of characterization and degree,[9] simply invites appeals, attendant stays, and with them the delays and disruption which the *Cobbledick* rule properly seeks to prevent.

2. Respondent may argue that the investigative

Kenya was clear. Even if the government had authority to proceed by letters rogatory—a point which has never been decided—it would be preferable not to invoke the aid of a foreign court if, as here, that can be avoided. Cf. 28 U.S.C. 1783. And, since the grand jury was merely seeking to investigate possible violations, letters rogatory would not be feasible.

[9] The court of appeals seeks to distinguish its earlier holding in *Lampman*, *supra*, on the basis that the order in that case "cannot be fairly compared in breadth, reach or overseas effect, to the one that is now before us." Such distinctions are easily asserted, yet will require careful judicial attention to determine on appeal if appeals are permitted. Since they do not create a clean or readily identifiable class of cases as to which appeals will be allowed, they invite litigation of the issue, and attendant stays, in an especially wide class of cases.

process in this case was not actually disrupted by the appeal, for here the court of appeals refused to stay the enforcement of the subpoena and orders or grant other extraordinary relief pending appeal. It takes little imagination, however, to foresee the disruption which may occur if the decision is permitted to stand. If such orders are appealable, stays will regularly be sought and obtained. Many may appeal who, if put to the test of risking citation for contempt, would acknowledge the correctness of an enforcement order or subpoena by producing the materials commanded; appeals may be used *simply* as an instrument of delay. Given the short life of the grand jury, relative to the life expectancy of an appeal (here, almost two years in the court of appeals alone), it will often be possible to frustrate the demand for information entirely. It will not do to say here, any more than it would have in *Cobbledick,* that the absence of interim relief makes the allowance of an appeal harmless; among other considerations, even if interim relief is denied, the pendency of an appeal as to the validity of the district court's action on a subpoena may substantially diminish the fear that noncompliance will result in punishment.

These effects are all the more striking considering that only a fraction of the information demanded in this case was subject to that part of the order requiring any application to Kenya officials. The court of appeals nonetheless entertained the appeal as to all the subpoenaed information. By the same reasoning,

any order in aid of a subpoena which can be labeled as "injunction," even if it affects only a small part of the information sought, would permit appeal and consequent interference with the investigative process as to the whole.

3. The Second Circuit's decision in *In re Grand Jury Investigation of Violations,* 318 F. 2d 533, 536, petition for a writ of certiorari dismissed, 375 U.S. 802, explicitly held that an order issued in connection with a motion to quash a grand jury subpoena could *not* be deemed an appealable injunction under 28 U.S.C. 1292 (a)(1). "The Supreme Court scarcely intended that the important policy pronouncements in Cobbledick and Di Bella could be side-stepped by baptizing a motion to quash as one to enjoin the prosecutor from enforcing a subpoena, or a motion to suppress as one for an injunction restraining the use of evidence and mandating its return; yet such a description would be quite as valid as that * * * [put] forth here." The Second Circuit's holding that that section is inapplicable to criminal proceedings had been confirmed by this Court's statement in *DiBella* v. *United States:* "Every statutory exception [to the rule of finality] is addressed either in terms or by necessary operation solely to civil actions." 369 U.S. at 126. See also *Miller* v. *United States,* 403 F. 2d 77, 78–79 (C.A. 2); *In re Buckey,* 395 F. 2d 385 (C.A. 6); and cf. *Lampman* v. *United States District Court, supra.* That the subpoena here related to records kept outside the United States does not affect the statutory issue, and these

holdings are thus in square conflict with the holding here.[10]

CONCLUSION

It is therefore respectfully submitted that certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

SEPTEMBER 1970.

[10] Even if the decision in this case were confined to grand jury subpoenas of records kept outside the United States, the international nature of much modern day crime necessitates many similar grand jury investigations; the obstacles to those investigations here threatened are themselves of sufficient importance to warrant consideration of the problem by this Court.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 23,343

IN THE MATTER OF THE GRAND JURY SUBPOENA DUCES TECUM OF RAYMOND J. RYAN, APPELLANT

[May 19, 1970]

Appeal from an Order of the United States District Court for the Central District of California

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Before JERTBERG, MERRILL, and ELY, Circuit Judges

PER CURIAM:

This appeal is from an Order of the District Court denying appellant's motion to quash a subpoena duces tecum, ordering him to produce most of the documents called for by the subpoena and requiring affirmative action in relation to other documents. Ryan presents several important contentions in this court, including persuasive arguments grounded in constitutional law. We have concluded that we need not resolve all of these issues, having finally become convinced that the Order is vague and overly broad.

Ryan, an American citizen, has been under investigation for tax evasion for several years. The aspect of the investigation with which we are dealing concerns several African businesses of which Ryan is apparently the principal shareholder. He was subpoenaed by the Grand Jury of the Central District of California and ordered to bring with him "all books, records, papers, and documents" pertaining

to five different companies, all located in Kenya. Ryan moved to quash the subpoena on the grounds, among others, that it was overly broad, that it was served improperly, and that full compliance with it would require him to violate Kenya law. The District Court denied the motion to quash and entered the Order from which Ryan appeals.

The Government contends that we have no jurisdiction to entertain the appeal, arguing that the Order is nothing more than an interlocutory order in a criminal proceeding. Several cases are cited in support of this contention. *Cobbledick* v. *United States,* 309 U.S. 328, 84 L. Ed. 783, 60 Sup. Ct. 540 (1940); *In re Grand Jury Investigation,* 318 F. 2d 533 (2d Cir. 1963); *In re Buckey,* 395 F. 2d 385 (6th Cir. 1968). In none of the cases cited, however, had the District Court ordered anything other than compliance with the subpoena. In contrast, the District Court here modified the subpoena with respect to certain documents and directed the appellant to undertake steps in a foreign country to have those documents released by other persons for transportation to this country or for inspection in Kenya by United States agents. In directing that affirmative action be taken in another country, the District Court did more than deny a motion to quash; it in effect granted a mandatory injunction which, given full effect, would require action by officials of the Kenyan Government. *See International Longshoremen's Assn.* v. *Philadelphia Marine Trade Assn.,* 389 U.S. 64, 19 L. Ed. 2d 236, 88 Sup. Ct. 201 (1968). We therefore, conclude, in the particular circumstances of this case, that we should hold the Order to be appealable under 28 U.S.C. § 1292(a)(1). *See Continental Oil Co.* v. *United States,* 330 F. 2d 347 (9th Cir. 1964).

Cf. Lampman v. *United States Dist. Ct.*, 418 F. 2d 215 (9th Cir. 1969).[1]

As an injunction, the Order is defective in not stating with sufficient particularity what Ryan was expected to do. Moreover, it is oppressive in scope, it being said without contradiction that Ryan's compliance would require him to transport 2000 pounds of records at his own expense from Kenya. The challenged Order incorporated by reference the subpoena, which had called for all records of the five businesses "including but not limited to checkbooks, books of accounting, disbursement journals, and any and all correspondence relating to these five entities, as well as records, books, papers, documents, and correspondence relating to the application of the currency control regulations and the foreign investments protection act of Kenya to these five" companies. The Government conceded that the subpoena itself was overly broad, but the District Court did not undertake to clarify it or to limit it, except to remove only a few documents from its attempted operation. As to those excepted documents, the Order required affirmative action on the part of Ryan that, arguably, would require him to violate the law of Kenya. Finally, we note that the need for the subpoena, or an injunction, could have been obviated by the use of letters rogatory. The District Court refused to require this approach because of information presented to the court *in camera* and not disclosed to Ryan or his counsel. This information purportedly related to Ryan's improper influence upon the Attorney Gen-

[1] In *Lampman*, the sole challenge to the subpoena was based on action allegedly conflicting with Internal Revenue Service administrative procedures. While we held the Order in *Lampman* was not appealable, that Order cannot be fairly compared, in breadth, reach, or overseas effect, to the one that is now before us.

eral of Kenya. On the record before us, we cannot accept the insinuation that the authorities of a friendly foreign power are subject to corruption. We were informed on oral argument that letters rogatory are now being pursued by the Government, and we have no reason to doubt that the Kenyan Government and its officials will respond in a manner consistent with their jurisprudential heritage.

Reversed.

APPENDIX B

JUDGMENT

United States Court of Appeals
FOR THE NINTH CIRCUIT

IN THE MATTER OF THE GRAND JURY SUBPOENA DUCES TECUM OF RAYMOND J. RYAN,

Appellant.

No. 23343

(D.C. Misc. 1926)

APPEAL from the United States District Court for the Central District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California

and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

A true copy
ATTEST: [illegible]
Clerk, U. S. Court of Appeals
By
Raymond H. Hackett
Deputy

Filed and entered May 19, 1970

APPENDIX C

United States Court of Appeals for the Ninth Circuit

No. 23,343

IN THE MATTER OF THE GRAND JURY SUBPOENA OF RAYMOND J. RYAN, APPELLANT

Before JERTBERG, MERRILL, and ELY, Circuit Judges

ORDER

The majority of the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. Judge Merrill would grant rehearing, but before the panel only.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

_____ _____,

_____ _____,

United States Circuit Judges.

APPENDIX D

District Court Order of July 25, 1968

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Misc. No. 1926

Court's Order

IN THE MATTER OF THE GRAND JURY SUBPOENA DUCES TECUM OF THE WITNESS, RAYMOND J. RYAN

The witness Raymond J. Ryan was served with a grand jury subpoena on March 5, 1968, requiring his appearance before the grand jury on April 15, 1968, and the production of various corporate documents.

Pursuant to motion to quash the subpoena duces tecum filed by the said witness his grand jury appearance was ordered continued to a future date.

Hearings on the motion to quash were held, and the Court finds that the petitioner Raymond J. Ryan at times before and after commencement of the investigation by the Treasury Department and Department of Justice has had control of the records, papers, and documents referred to by the subpoena duces tecum which pertain to the operation of Ryan Investment, Ltd., of Nairobi, Kenya, and Mawingo, Ltd., of Nanyuki and Nairobi, Kenya, doing business as The Mount Kenya Safari Club of Kenya.

WHEREFORE, IT IS ORDERED THAT:

I. The motion of Raymond J. Ryan to quash the subpoena duces tecum is denied.

II. Raymond J. Ryan will produce, with the exception of the books of account, minute books and the list of members, before the Federal grand jury at Los Angeles, California, on September 11, 1968, the books, records, papers and documents of Ryan Investment, Ltd., of Nairobi, Kenya, and Mawingo, Ltd., of Nanyuki and Nairobi, Kenya, doing business as The Mount Kenya Safari Club, referred to in the April 15, 1968, subpoena duces tecum served on Raymond J. Ryan.

III. Raymond J. Ryan shall forthwith make application to the Registrar of Companies in Kenya to release the books of account, minute books, and list of members so that Raymond J. Ryan may produce these books, records, papers and documents at the Federal grand jury held at Los Angeles, California, on September 11, 1968, provided that if Raymond J. Ryan is unable to secure the consent of the Registrar of Companies of Kenya, then Raymond J. Ryan will make available to agents of the United States Department of Justice and/or the United States Department of the Treasury the books of account, minute books, and list of members, of Ryan Investment, Ltd., and Mawingo, Ltd., and these agents may inspect and make copies of these books and records.

/s/ MANUEL L. REAL
Manuel L. Real
United States District Judge

APPENDIX E

In the United States Court of Appeals for the Ninth Circuit

No. 23144

RAYMOND JOHN RYAN, PETITIONER,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, JUDGE MANUEL L. REAL, RESPONDENT

Before BARNES, HAMLEY and MERRILL, *Circuit Judges*

ORDER

Raymond John Ryan, having moved herein for an order in the nature of extraordinary relief prohibiting and restraining The Honorable Manuel L. Real, District Judge, United States District Court for the Central District of California, from enforcing an order entered July 25, 1968, commanding Ryan to comply with a grand jury subpoena duces tecum, as amended, requiring Ryan to produce certain records before the grand jury in Los Angeles on September 11, 1968, and having moved herein for an immediate stay on the grand jury subpoena and the implementing district court order pending a determination of the motion for an order in the nature of extraordinary relief; and

It appearing to the Court, upon the showing made in the papers filed and oral argument had on August 22, 1968, that exceptional circumstances do not exist warranting this Court in entertaining, on the merits, the motion for an order in the nature of extraordinary relief: Now, therefore, it is

Ordered, That, on this limited ground, and without reaching the merits, the motion for an order in the nature of extraordinary relief is denied; and it is further

Ordered, That because of the delay unavoidably occasioned in seeking relief in this Court, the time for compliance with the subpoena duces tecum is stayed from September 11, 1968 to September 23, 1968, unless the district court shall set a later date for such compliance; and it is further

Ordered, That, this Court being of the view that the Supreme Court of the United States would not ordinarily grant a writ of certiorari to this Court to review an order of this kind, Ryan's motion, made at the time of the oral argument, to grant a stay for thirty days to enable him to petition for a writ of certiorari is denied.

Stanley N. Barnes,
Frederick G. Hamley,
Charles M. Merrill,
United States Circuit Judges.

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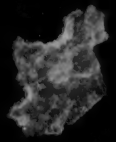

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 758

UNITED STATES OF AMERICA, *Petitioner*

v.

RAYMOND J. RYAN

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 13-16) is reported at —— F.2d ——.

JURISDICTION

The decision and judgment of the court of appeals was filed on May 19, 1970. Petitioner requested and received an extension of time to and including June 29, 1970, for the filing of a petition for rehearing and rehearing *en banc,* and such a petition was filed on June 29, 1970. It was denied on July 29, 1970. Petitioner requested and received an extension of time to and including September 27, 1970, for the filing of

a petition for a writ of certiorari, and the petition was filed on September 26, 1970. Jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an oppressive and imprecise district court order denying respondent's motion to quash a grand jury subpoena duces tecum *and* directing respondent (1) to produce substantially all the "books, records, papers and documents" of two Kenya corporations, (2) to apply to the Registrar of Companies of Kenya for release of these records and, (3) if such application be denied, to make the records "available to agents of the United States Department of Justice and/or the United States Department of the Treasury" for inspection and copying in Kenya is nonappealable under *Cobbledick* v. *United States*, 309 U.S. 323 (1940), as a denial of a motion to quash a grand jury subpoena duces tecum.

STATEMENT

Respondent is a United States citizen who traveled to the United States voluntarily from Kenya, East Africa, to be the principal government witness in a highly celebrated federal criminal trial in 1964, wherein judgments of conviction were affirmed and certiorari was denied by this Court. *United States* v. *Marshall*, 355 F.2d 999 (9th Cir. 1966), certiorari denied, 385 U.S. 815 (1966). As a result of the publicity given him by that trial, respondent and his business ventures became the subjects of a tax investigation by the Internal Revenue Service. Special agents of the Service demanded and were given access to records of the Ryan Oil Company, a domestic partnership belonging to respondent and his wife. Office space was made

available to them, and they inspected the records on the premises for an extended period. (R. Vol. 2, p. 9; R. Vol. 3, p. 4).[1]

Thereafter, the Internal Revenue Service sought to obtain records of companies located in Kenya which they believed to be under the control of respondent. Internal Revenue Service summonses for all or some of such records were served on respondent on November 18, 1966, and, more than a year later, on November 21, 1967 (R. Vol. 1, pp. 27-28, 32-38). Respondent explained in each instance that he could not comply because he did not have custody or control of the books or records, and no enforcement action was taken (R. Vol. 2, pp. 9-10). In addition, federal grand jury subpoenas were served on respondent on July 27, 1967, and August 4, 1967, directing him to testify and to produce certain membership and financial records of Mawingo, Ltd., one of the Kenya companies. Such of the records as were located within the jurisdiction were turned over to Internal Revenue Service agents, who appeared to be acting for the grand jury (*id.* at 10). Respondent's own appearance was deferred.

Respondent was thereafter advised by letter of February 2, 1968, from the Department of Justice to his attorney that he was expected to appear on February 21, 1968, before the federal grand jury pursuant to the subpoena served on August 4, 1967 (R. Vol. 1, p. 29). Respondent returned from Africa for this ap-

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[1] "R. Vol. 1" refers to the documents contained in "Volume One" of the record transmitted to the Court of Appeals. "R. Vol. 2" refers to the Reporter's Transcript of the proceedings on March 5, 1968. "R. Vol. 3" refers to the consecutively paginated Reporter's Transcript of the proceedings of April 9, May 14, July 10, 12 and 15, 1968.

pearance, which was rescheduled at counsel's request for March 5, 1968 (R. Vol. 1, p. 7).

When he appeared on March 5, 1968, his attorney noted that the grand jury which had issued the subpoena in August 1967 had been discharged on September of that year and that the subpoena was, therefore, *functus officio* (R. Vol. 2, pp. 11-12). Government counsel thereupon, in open court, served on the respondent the subpoena which is at issue here and which is reproduced as Appendix A to this brief (pp. 1a, *infra*). He asked that the court issue an order directing respondent to comply with the subpoena, which had a return date of April 15, 1968. The government's motion was denied on the ground that it was premature (R. Vol. 1, pp. 15-16).

Respondent thereafter moved to quash the subpoena on the grounds, *inter alia,* that the records were not in his custody or control, that compliance would be oppressive and unreasonable, and that it would violate the laws of Kenya for him to remove the records from that jurisdiction (R. Vol. 1, pp. 2-21). On July 25, 1968, after several court sessions during which counsel presented legal arguments concerning the validity of the subpoena, the district court ordered respondent to appear before the grand jury on September 11, 1968. The district judge personally directed the defendant as follows in open court (R. Vol. 3, pp. 228-229):

> The order will be also, Mr. Ryan, that you produce with the exception of the books of account, the minute books and list of members before the Grand Jury on September 11, the books, records, papers and documents of Ryan Investments, Ltd. of Nairobi, Kenya and Mawingo, Ltd. of Nanyuki and Nairobi, Kenya, doing business as the Mount Kenya Safari Club. You shall also forthwith make application to the registrar of companies

> in Kenya to release the books of account, minute books and list of members so that you may produce these books, records, papers and documents at the Federal Grand Jury on September 11, 1968. Failing your ability to get the consent of the registrar of companies in Kenya to release such books for presentation you will make available to agents of the United States Department of Justice and/or the United States Department of Treasury the books of account, minute books and list of members of Ryan Investments, Ltd. and Mawingo, Ltd. as set forth above so these agents may inspect and make such copies of these books in Kenya.

A written order generally to the same effect was signed and filed on July 25, 1968 (Pet. 19-20). Respondent's appeal from that order resulted in the decision now sought to be reviewed by the instant petition. The courts of appeals reversed the challenged order of the district court, finding that the order was appealable because it directed "that affirmative action be taken in another country" and thereby "in effect granted a mandatory injunction which, given full effect, would require action by officials of the Kenya Government" (Pet. 14).

Considering the merits, the court below recognized that appellant had presented "several important contentions . . . including persuasive arguments grounded in constitutional law"[2] (Pet. 13). Without reaching these broader claims, the court found the order invalid on the grounds that it lacked particularity and was oppressive in scope (Pet. 15).

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[2] Respondent had challenged the validity of the subpoena under the Fourth and Fifth Amendments and had maintained that he was immune from service of process when he was served with the subpoena. These contentions were in addition to the arguments enumerated above—i.e., that the subpoena was oppressive and that it required respondent to violate foreign law.

ARGUMENT

1. Without seriously challenging the conclusion reached by the court below as to the lack of particularity and patent oppressiveness of the district court's production order,[3] the government urges this Court to grant certiorari in order to hold that respondent must stand trial for contempt before he can obtain appellate reversal of that plainly improper order. Such a course would put this Court to a senseless and fruitless task, particularly since the court below did not purport to establish any novel principle of law or depart in any manner from the established doctrines regarding appealability which have followed *Cobbledick* v. *United States,* 309 U.S. 323 (1940).

How wasteful of this Court's resources it would be if the Court were to give plenary consideration to this case becomes apparent once the consequences of accepting the government's argument are analyzed. If the government is right, the patently defective order of the district court is not presently appealable, but its validity may be considered by a court of appeals only on review of a citation of civil contempt or conviction for criminal contempt. The court of appeals has already held, however, that the constitutional challenges to the validity of the order are "persuasive"

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[3] The only discussion of the merits appears at pp. 8-9, note 8 of the petition, in which it is asserted that since the companies existed "only since 1959 . . . there was no vagueness as to the time period involved." The decision of the court below did not turn on any vagueness as to time. Rather, the court was plainly taken aback by the wholesale nature of an order directing that essentially *all* financial records of two companies be hauled from Kenya and produced before a grand jury.

(Pet. 13) and that the order "is vague and overly broad" (*ibid.*). Accordingly, a reversal by this Court could result only in a citation for contempt which the court of appeals has already found to be based on an invalid order.

2. Nor can it be claimed that the court of appeals has so far departed from this Court's binding decisions that review is now required irrespective of its unfair impact on the respondent and the fruitless nature of a reversal. The court below explicitly recognized and reaffirmed the *Cobbledick* rule which bars premature appellate review of a judicial determination that a grand jury subpoena should not be quashed. Indeed, in its opinion, the court distinguished its recent decision in *Lampman* v. *United States District Court,* 418 F.2d 215 (1969), certiorari denied, 90 S.Ct. 926 (1970)—cited by the court with apparent approval—where it had dismissed an appeal from such an order on the authority of *Cobbledick.* (See Pet. 14-15, and note 1.) Its decision in the present case was based not on any general proposition of law which would undermine all or any significant portion of the *Cobbledick* principle; it was, rather, a decision expressly limited to "the particular circumstances of this case" (Pet. 14). Hence no issue of general importance is presented by the petition, and it does not warrant the time of this Court required for plenary consideration.

3. The government's suggestion that the decision will "invite litigation" is totally unsupported by any facts or statistics regarding the prevalence of orders of the kind involved here. Indeed, the government does not assert that there has ever been a *single* other in-

stance,[4] to its knowledge, of a district court order directing a grand jury witness to make application to an official of a foreign government and, if that application be denied, to take steps on foreign soil to make records available for copying to Justice or Treas-

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[4] There have been some reported cases involving subpoenas of administrative agencies directed to records of domestic corporations which are located abroad. The only case respondent has found in which provisions like those in this case were invoked is *Securities and Exchange Commission* v. *Minas de Artemisa, S.A.*, 150 F.2d 215 (9th Cir. 1945), where the SEC sought judicial enforcement of an agency subpoena directed to a domestic corporation "to produce books and records located in Mexico." 150 F.2d at 216. (The demand was not—as here—for substantially *all* the records of the corporation but only for those pertaining to certain public sales of the corporation's stock.) Reversing a district court order which had dismissed the SEC's application for enforcement, the Ninth Circuit held that the domestic corporation could lawfully be directed to bring the records into the jurisdiction. The court also noted that there had been conflicting testimony in the district court as to whether the law of Mexico would be violated by withdrawal from that jurisdiction of the required records. It then stated that the district court "erred in failing to enter an order" which would have required an application to the Mexican authorities for permission to remove the documents and, if that request were denied, the granting of access to the records to the SEC's staff in Mexico. 150 F.2d at 218-219.

This decision certainly does not support the proposition that such an order is nonappealable. Indeed, under the Securities Act any disposition by the district court in that case would have been reviewable immediately in the court of appeals. See 15 U.S.C. 77v(a), (b); *e.g.*, *Shasta Minerals and Chemical Co.* v. *Securities and Exchange Commission*, 328 F.2d 285 (10th Cir. 1964). Nor does this 25-year-old decision—which has been relied upon and cited for the proposition that an administrative agency may obtain a court order requiring documents to be brought from abroad—warrant the conclusion that orders of the kind entered by the district court are issued so often in the enforcement of grand jury subpoenas that their appealability *vel non* is a recurring legal issue. Respondent has found only two reported decisions in which a question was raised as to the legality under foreign law of complying with a grand jury subpoena duces tecum. In one of

ury Department officials.[5] Yet the import of its petition is that if an appeal is allowed in these peculiar circumstances the floodgates will be opened for delays of other grand jury investigations. We submit that an analysis of such investigations will show that in the overwhelming preponderance of cases—if not in all—motions to quash grand jury subpoenas, if unfavorably acted upon, are simply denied. In the *Lampman* case the Ninth Circuit very recently and most emphatically held that such a decision is not appealable, and there is no real danger, therefore, that legitimate steps taken pursuant to a grand jury investigation would in any manner result in undue interference or delay.

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these cases—*Application of Chase Manhattan Bank*, 192 F.Supp. 817, 191 F.Supp. 206 (S.D.N.Y. 1961)—the district court concluded that the *government* had the obligation of seeking approval of the foreign authorities for permission to have certain documents released. In the other case—*In re Investigation of World Arrangements*, 13 F.R.D. 280 (D.D.C. 1952)—the district judge expressed a willingness to grant an order, on the government's application, which would be modeled after the provisions suggested in *Minas de Artemisa*. There was not the slightest suggestion, however, that such an order would be anything but an independent mandatory injunction, and not part of the disposition of the motions to quash or limit the grand jury subpoena. Hence such an order—which appears never to have been issued—would be appealable under 28 U.S.C. 1292(a). See also *United States* v. *Ross*, 302 F.2d 831 (2d Cir. 1962), where the Second Circuit treated as an appealable interlocutory order under 28 U.S.C. 1292(a) certain judicial directions concerning stock held abroad which were issued pursuant to a jeopardy assessment.

[5] The very inclusion of Treasury Department representatives as possible examiners of the material in Kenya demonstrates how the challenged order differs from a bare denial of a motion to quash a grand jury subpoena. Obviously, if respondent were required to comply with the subpoena's terms only, the documents involved would be seen only by members of the grand jury and attorneys for the government. The challenged order made them available in Kenya to Internal Revenue Service Agents.

4. Moreover, there is a very plain and practical differency between the bare denial of a motion to quash a subpoena (which is not appealable under *Cobbledick*) and the order entered by the district court in this case. As this Court noted in *United States* v. *Bryan,* 339 U.S. 323, 330-331 (1950), quoted in *McPhaul* v. *United States,* 364 U.S. 372, 378 (1960), "[a] court will not imprison a witness for failure to produce documents which he does not have unless he is responsible for their unavailability . . . or is impeding justice by not explaining what happened to them." If respondent's motion to quash had simply been denied, he might have refused to comply and defended against a contempt charge by showing not only that the subpoena was imprecise and oppressive, but also by pointing to the impossibility of compliance without the approval of officials of the government of Kenya. If the government had then chosen to require respondent to take the steps directed by Paragraph III of the district court's order, it would have had to do so by instituting an ancillary proceeding or seeking an order under the All Writs Act, 28 U.S.C. 1651.[6] Such an order separate and apart from the grand jury subpoena, would plainly have been appealable. By consolidating the denial of the motion to quash with the obligations imposed by paragraph III of the order, the government and the district court have attempted to "leapfrog" the appellate review which would have

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[6] Even if the district judge had rejected the defense based upon requirements of Kenya law, he would have been obliged to "consider the feasibility of coercing testimony through the imposition of civil contempt . . . [and could] resort to criminal sanctions only after he determine[d], for good reason, that the civil remedy would be inappropriate." *Shillitani* v. *United States,* 384 U.S. 364, 372 n. 9 (1966). A civil contempt order would, of course, have been appealable.

resulted if proper procedures had been followed. They have now sought to put respondent in the position where he commits criminal contempt if he fails to make the prescribed application to the registrar in Kenya or does not take the alternative steps in Kenya directed by the court order.[7]

This difference between the operative effect of the subpoena, standing alone, and the effect of the order is no inadvertent or minor distinction. In the course of the various proceedings which followed the respondent's appeal from the order of July 25, 1968, and which ultimately resulted in the contempt citation, the district judge made the following observations (Transcript of October 2, 1968, pp. 39-40 *In the Matter of Raymond J. Ryan,* Misc. No. 1926; emphasis added):

> "THE COURT: * * * Here you say that you want an application for an order to show cause as to why he should not be held in contempt for failure to comply with the demands of the subpoena duces tecum.
>
> Well, *it isn't the demands of the subpoena duces tecum that he* [*Ryan*] *was under order to comply* with at the time of the order of the Court. It was certain portions of that subpoena duces tecum, *and the subpoena duces tecum was used by the Court only in terms of reference to certain documents which* were set forth therein, not to the subpoena in its entirety.
>
> * * *
>
> THE COURT: Mr. Ryan is under specific orders of the Court—*not* to comply with the subpoena, but to do certain things, and that was the order of the Court. . . ."

[7] In fact, the district court *did* cite the respondent for criminal contempt, and that proceeding is now pending in the district court—presumably awaiting the outcome of the government's petition in this case. *In the Matter of Raymond J. Ryan,* U.S.D.C. Cent. Dist. Cal., Misc. No. 1926.

5. The only decision cited by the government as allegedly conflicting with the decision below is *In re Grand Jury Investigation of Violations,* 318 F.2d 533 (2d Cir. 1963), certiorari dismissed, 375 U.S. 802 (1963), which is plainly inapposite. In that case, the General Motors Corporation, as the employer of witnesses who had been subpoenaed to appear before a grand jury, requested the district court to issue certain protective orders which would prevent the witnesses' testimony from being used in another pending criminal case against General Motors. When the district court denied the requested relief, General Motors sought to appeal to the Court of Appeals for the Second Circuit, which dismissed the appeal on the authority of *Cobbledick.* There is a plain and obvious distinction between an appeal by a witness or some other party who has unsuccessfully sought in the district court to engraft upon a grand jury subpoena certain extraneous conditions and an appeal by a witness who, at the government's behest, was subjected to obligations in addition to those set forth in the subpoena itself. If appeals were permitted in the first class of cases (typified by the Second Circuit decision) every grand jury witness (or affected third party) could delay his testimony by seeking additional conditions and appealing from the denial of such conditions. But that avenue is not opened by the decision below, which simply permits a subpoenaed witness whom the government and the court have encumbered with added obligations to obtain appellate review of the judicial decree which imposes those new obligations. In those circumstances, the court order falls squarely within the definition of a mandatory injunction given by this Court in *International Longshoreman's Ass'n* v. *Philadelphia Marine Trade Ass'n,*

389 U.S. 64, 75 (1967): "[A]n equitable decree compelling obedience under the threat of contempt. . . ." And the availability of prompt appellate review comes within the policy of 28 U.S.C. 1292(a)(1) rather than within the rule that the enforcement of grand jury subpoenas is nonappealable.

CONCLUSION

The record in this case demonstrates that the Internal Revenue Service has been trying for many years to obtain the record of certain companies in Kenya in the belief that respondent has control over those companies. Using a federal grand jury subpoena as a means of placing respondent under a judicially enforceable order to produce,[8] the government obtained from a district court a wide-ranging order under which respondent is required to take substantial affirmative action abroad to make the documents available to government agents. Having lost in the court of appeals the question whether the order is too imprecise and oppressive to be enforced, the government is now seeking to compel respondent to await a criminal contempt trial before he may assert that infirmity. There is no significant issue of law in this case and no conflict of decisions. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

HERBERT J. MILLER, JR.
RAYMOND G. LARROCA
NATHAN LEWIN
MILLER, CASSIDY, LARROCA & LEWIN
1320 19th Street, N. W., Suite 500
Washington, D. C. 20036
Attorneys for Respondent

[8] Attempts to obtain judicial enforcement of the IRS summonses would, of course, have been appealable immediately.

APPENDIX

APPENDIX

APPENDIX

Grand Jury Subpoena of March 5, 1968

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Subpoena To Testify Before Grand Jury

To Ray Ryan
Director Mawingo Limited
d/b/a Mt. Kenya Saffari Club
Nanyuki, Kenya

You are hereby commanded to appear in the United States District Court for the Central District of California at 312 N. Spring Street in the city of Los Angeles on the 15 day of April 1968 at 10:00 o'clock A.M. to testify before the Grand Jury and bring with you [1] all books, records, papers, and documents in your possession or under your custody and/or control, either personally or as corporate officer, director, or representative, pertaining to Ryan Investment Limited, Nairobi, Kenya, Mount Kenya Safari Club, Nanyuki and Mairobi, Kenya, Nawingo Limited, Kanyuki and Nairobi, Kenya, and Zimmerman Limited, P. O. Box 2127, Nairobi, Kenya, and Seven-Up Bottling Co. (Kenya) Limited, Nairobi, Kenya, including but not limited to checkbooks, books of accounting, disbursement journals, and any and all correspondence relating to these five entities, as well as records, books, papers, documents and correspondence re-rating in any way to the application of the currency control regulations and the foreign investments protection act

---

[1] Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

of Kenya to these five herein described entities, enterprises or corporations.

This subpoena is issued on application of the United States.

JOHN A. CHILDRESS
Clerk

ROBERT J. FOLLIS
Deputy Clerk

Date March 5, 1968

WM. MATTHEW BYRNE, JR., *U. S. Attorney*
312 North Spring Street, Los Angeles, Calif. 90012

RETURN

Received this subpoena at on
and on at I served it on the
within named
by delivering a copy to h

.....
By .....

Date ....., 19....
Service Fees
Travel ..... $
Services ....
Total ..... $

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417-974—71——1

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 758

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND J. RYAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 71–73) [1] is reported at 430 F. 2d 658.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1970 (A. 74). A petition for rehearing with suggestion for rehearing en banc was denied on July 29, 1970 (A. 75). On September 2, 1970, pursuant to a motion filed on August 28, Mr. Justice Mar-

[1] "A." refers to the Appendix in this Court. "R." preceded by volume number refers to the certified transcript of record on file with the Clerk.

shall extended the time for filing a petition for a writ of certiorari to September 27, 1970. The petition was filed on September 26, 1970, and was granted on January 18, 1971 (A. 75). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's order denying respondent's motion to quash a grand jury subpoena requiring production of records maintained under his control in a foreign country was rendered appealable because, as to some of the records, the district court limited respondent's obligation to taking certain steps looking toward production.

2. If so, whether the court of appeals erred in holding the order invalid.

STATUTES INVOLVED

28 U.S.C. 1291 and 1292(a)(1) provide in pertinent part:

> § 1291. *Final decisions of district courts.*
>
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * [with an immaterial exception].
>
> § 1292. *Interlocutory decisions.*
>
> (a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States * * * granting, continuing, modifying, refusing or dissolving

injunctions * * * [with an immaterial exception];

* * * * *

STATEMENT

On March 5, 1968, a federal grand jury in the Central District of California, sitting in Los Angeles, issued a subpoena *duces tecum* directing respondent Ryan, a citizen of the United States, to produce before it on April 15, 1968, all books, records, and documents of five named companies doing business in Kenya (A. 9, 11–12). Respondent moved to quash the subpoena, claiming, *inter alia,* that compliance would be oppressive and unreasonable, and that removal from Kenya of certain of the records would violate a Kenya law prohibiting removal of corporate books of account, minute books, and lists of members without the consent of the Registrar of Companies (1 R. 10–11, ~~51–55~~). Following proceedings over a period of several months, the district court on July 25, 1968, found that respondent had control of the records of two of the named companies (Ryan Investments, Ltd. and Mawingo, Ltd., doing business as the Mount Kenya Safari Club),[2] and denied the motion to quash as to

[2] The precise language of the district court's finding was "that petitioner Raymond J. Ryan at times before and after commencement of the investigation by the Treasury Department and Department of Justice has had control of the records, papers, and documents referred to by the subpoena duces tecum * * *" (A. 63). Certain of these records, which respondent had stored in Palm Springs, California, had been produced by him pursuant to an earlier grand jury subpoena, issued in July 1967.

those records, requiring their production before the grand jury on September 11, 1968 (A. 63–64). The court, however, made an exception as to the "books of account, minute books and list of members" because of the restrictions of Kenya law. With respect to these, the July 25 order directed respondent to request permission from the Registrar of Companies in Kenya for their production in Los Angeles on the return date; should such permission be refused, respondent was directed to make those records available for inspection and copying by United States agents in Kenya (A. 64). The judge had indicated a willingness to include in his order a government offer to relieve respondent of transporting *any* of the records from Kenya (the records originally subpoenaed were claimed by a witness for respondent to weigh some 2,000 pounds (1 R. 45)) by having federal agents, on the grand jury's behalf, inspect and copy them in Kenya. Respondent declined the offers (A. 52–62; 1 R. 65–66).

Following the filing of a notice of appeal from the district court's action (and before the return date), respondent sought extraordinary relief in the court of appeals to prohibit enforcement of the district court's order and for a stay of proceedings. After oral argument the court of appeals denied the requested relief, but extended the return date to September 23, 1968.[3] The appeal itself remained pending.

On September 23, 1968, respondent appeared before the grand jury as ordered, but otherwise disobeyed the

[3] The court of appeals' order is set forth at pp. 21–22 of the petition. Respondent made a further application to the Circuit Justice, who also refused to stay the proceedings.

district court's order. He had failed to produce the records not subject to the limitations of Kenya law, had not applied to Kenya authorities for release of the specified records, and had not made any records available for inspection and copying in Kenya. The district court ordered respondent to show cause why he should not be held in civil contempt for his noncompliance. In connection with that proceeding, the court allowed respondent to issue letters rogatory to two witnesses in Kenya claimed to be necessary to his defense. On December 10, 1968, shortly before the term of the grand jury was to expire on December 21, the show-cause order, was converted (on application by the government) into an order to show cause why respondent should not be held in criminal contempt. On October 20, 1969, the court of appeals stayed the criminal contempt proceeding pending decision of the appeal from the district court's action on the subpoena (4 R. 3–4);[4] that criminal contempt proceeding is still pending.

Seven months later, on May 19, 1970, the court of appeals set aside the district court's order of July 25, 1968. The court held that, since the order provided for affirmative action in Kenya as to some of the records, it "did more than deny a motion to quash; it in effect granted a mandatory injunction which, given

[4] The court of appeals contemporaneously stayed the trial of respondent on a charge of obstructing justice (18 U.S.C. 1503) by falsifying certain records which respondent had produced pursuant to an earlier grand jury subpoena (4 R. 4–14). Subsequent to the court of appeals' decision in this case, respondent was tried and convicted on the obstruction of justice charge. A. 67

full effect, would require action by officials of the Kenyan Government." The court concluded that the entire order (including the part leaving some of the subpoena undisturbed) was therefore appealable as an interlocutory injunction under 28 U.S.C. 1292(a)(1) (A. 72). Treated as an injunction, the court found that the order was defective for not stating with sufficient particularity what respondent was expected to do. It also found the order oppressive in that respondent's "compliance would require him to transport 2,000 pounds of records at his own expense from Kenya," and otherwise overbroad in scope. The court expressed the view that the need for a subpoena could have been obviated by the use of letters rogatory (A. 72–73).[5]

SUMMARY OF ARGUMENT

I.

The decision below is a substantial departure from the principle of *Cobbledick* v. *United States,* 309 U.S. 323, that district court orders denying motions to quash grand jury subpoenas cannot be appealed. Indeed, it is a particularly anomalous departure in this case since the order modifying the subpoena

[5] The court stated in its opinion that "letters rogatory are now being pursued by the Government" (A. 73). The only letters rogatory relating to the present case are those of respondent, issued in connection with his defense to the contempt proceedings. In connection with those letters rogatory, the government has submitted cross-interrogatories to be propounded to respondent's witnesses, including a request that the witnesses produce documents; it is, perhaps, these cross-requests that caused the court of appeals' statement.

sought to minimize difficulties respondent might encounter in complying with the grand jury command. Other situations may arise where auxiliary commands are necessary. Faced with the ruling below, which can be read as considering such auxiliary directives dispositive on the question of appealability, district courts will obviously be reluctant to modify subpoenas for fear that to do so will open the door to immediate appeals and attendant obstruction of grand jury investigations.

A. This Court in *Cobbledick* held an order denying a motion to quash nonappealable in furtherance of longstanding notions of finality, particularly in the criminal context where "encouragement of delay is fatal to the vindication of the criminal law" (309 U.S. at 325). It found that there was no compelling reason to depart from these principles since full review as to the validity of the subpoena would be available if, and when, the balking witness was subsequently held in contempt. This Court has since explicitly recognized the vitality of the *Cobbledick* rule of finality in a wide variety of cases including the grand jury context (*e.g., DiBella* v. *United States,* 369 U.S. 121). It has also, in an analogous line of decisions, reaffirmed the long-established proposition that, to carry out their unique and vital investigatorial powers, grand juries must remain unfettered by limitations which apply in the adversary context. *E.g., Costello* v. *United States,* 350 U.S. 359. It seems clear therefore that had the district court done no more than refuse to quash the subpoena in this case, its

order, under familiar principles, would not have been appealable.

B. There was no reason to apply a different rule in this case because the district judge felt that compliance would be aided by modifying the subpoena to require respondent to take "affirmative action" "in a foreign country." We fail to understand why such modification by the district court—obviously prompted by a desire to take account of certain objections raised by respondent and thereby to make compliance less burdensome—makes the order appealable. As we show neither logic nor precedent supports this distinction.

Moreover, the court of appeals' invocation of an appellate remedy under 28 U.S.C. 1292(a)(1), by labelling the order a "mandatory injunction," is inconsistent with the strict limitations on such appeals. That statutory provision has been narrowly applied by this Court in civil cases (*e.g., Switzerland Cheese Association, Inc.* v. *Horne's Market,* 385 U.S. 23) in the overriding interests of finality. *A fortiori* the provision should be inapplicable when dealing with grand jury investigations. Compare *Younger* v. *Harris,* No. 2, this Term, decided February 23, 1971.

C. There are no special circumstances in this case which justify a deviation from *Cobbledick.* The very incorrectness of the reasoning below creates a real danger that its rule will be applied in an uncritical

fashion. There is no persuasiveness in the possible argument that since the district court refused to grant a stay, the grand jury process was not actually disrupted. Unless the decision below is reversed, it takes little imagination to foresee disruption in other cases where stays will be regularly sought and obtained. This case, therefore, poses no fanciful danger of interference with the grand process; rather it has a real potential for disruption of an investigative proceeding which has always loomed so significantly in our history. To sustain the decision below can, in short, lead only to delay in the grand jury investigation and interfere with its traditional and vital functions.

II.

Even assuming *arguendo* that the order was appealable, the court below erred in finding it defective. We show that, as modified, the subpoena was neither overbroad nor oppressive and the order fully apprised respondent of his obligations (see *infra*, pp. 26–31).

ARGUMENT

I.

THE ORDER REFUSING TO QUASH THE GRAND JURY SUBPOENA *DUCES TECUM* WAS NOT MADE APPEALABLE BY ITS PROVISIONS EASING THE BURDEN OF COMPLIANCE

The court of appeals left little doubt that had the district court simply let the subpoena *duces tecum* stand it would have refused to entertain the appeal.

Yet because the district judge deemed it appropriate to modify the subpoena with respect to the production of a limited class of records in an obvious effort to take account of respondent's objections and make compliance less burdensome, the order, in the words of the opinion below, was transformed into a "mandatory injunction" appealable under 28 U.S.C. 1292(a)(1). This result can be supported neither in precedent nor logic. Unless overturned, it seriously threatens the functioning of grand jury proceedings.

A. An order refusing to quash a subpoena is reviewable only after an adjudication of contempt for disobeying it.

1. Thirty years ago in *Cobbledick* v. *United States*, 309 U.S. 323, the Court was faced with the issue whether district court orders denying motions to quash grand jury subpoenas *duces tecum* were "final decisions of district courts" and, as such, reviewable under what is now 28 U.S.C. 1291. In setting the framework for its ultimate conclusion that they were not—that the only way review of such orders could be had was on appeal if the witness was held in contempt for failing to obey—the Court relied upon historic tradition[*] and weighty considerations of policy. Its summary of these principles deserves repetition (309 U.S. at 325–326):

> Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the

[*] The statutory requirement of finality was contained in the first Judiciary Act. 1 Stat. 73, 83–85, Sections 21, 22, and 25 of the Act of September 24, 1789.

> very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. Not until 1889 was there review as of right in criminal cases [footnote omitted]. An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal. * * *

Cobbledick (unanimous except for the non-participation of a single Justice) found the foregoing considerations compelling in the context of grand jury proceedings, which it recognized to be at the core of an effective criminal justice system (*id.* at 327–328):

> * * * The Constitution itself makes the grand jury a part of the judicial process. * * * The

> proceeding before a grand jury constitutes "a judicial inquiry" * * * of the most ancient lineage. * * * The duration of its life, frequently short, is limited by statute. It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the "orderly progress" of investigation should no more be encouraged in one case than in the other. That a grand jury proceeding has no defined litigants and that none may emerge from it, is irrelevant to the issue. The witness' relation to the inquiry is no different in a grand jury proceeding than it was in the *Alexander case.* [1] Whatever right he may have requires no further protection in either case than that afforded by the district court until the witness chooses to disobey and is committed for contempt. * * *At that point the witness' situation becomes so severed from the main proceeding as to permit an appeal. * * *

Cobbledick accordingly established the firm principle that the interest in avoiding delay overrides the interest of a grand jury witness in interlocutory appellate review of the obligations imposed upon him by a subpoena.

2. In the years since, the lower courts have uniformly applied the *Cobbledick* rule where attempts have been made to seek review of orders denying motions to quash

---

[1] *Alexander* v. *United States*, 201 U.S. 117, held interlocutory and nonappealable an order to a witness to answer questions and produce documents in a civil suit by the United States under the antitrust laws.

grand jury subpoenas. See *e.g.*, *Lampman* v. *United States District Court*, 418 F. 2d 215 (C.A. 9), certiorari denied, 397 U.S. 919; *In re Buckey*, 395 F. 2d 385 (C.A. 6); *In re Grand Jury Investigation of Violations*, 318 F. 2d 533 (C.A. 2), petition for certiorari dismissed, 375 U.S. 802. *Dugan & McNamara* v. *Clark*, 170 F. 2d 118 (C.A. 3).[8]

Nor has this Court cast any doubt upon the continuing vitality of the *Cobbledick* rule. Rather, it has reaffirmed its rationale in a wide variety of contexts.[9] Thus, in *DiBella* v. *United States*, 369 U.S. 121, the Court held that a motion to suppress evidence, even

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[8] But compare *Continental Oil Co.* v. *United States*, 330 F. 2d 347 (C.A. 9), where another panel of the Ninth Circuit earlier held that an order to quash a grand jury subpoena was reviewable either by way of appeal or through an extraordinary writ, but did not choose between these remedies. To the extent that *Continental Oil* held that the order might be reviewable by way of appeal it was plainly erroneous under *Cobbledick*—as the later panel decision in *Lampman*, *supra*, 418 F. 2d at 216–217 expressly recognized. Nor is such relief available by extraordinary writ, see *Will* v. *United States*, 389 U.S. 90; *Lampman* tacitly conceded as much (418 F. 2d at 217).

[9] See *e.g.*, *Corey* v. *United States*, 375 U.S. 169, 176; *Andrews* v. *United States*, 373 U.S. 334, 340; *Will* v. *United States*, 389 U.S. 90, 96; *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306; *DiBella* v. *United States*, 369 U.S. 121, 124; *Parr* v. *United States*, 351 U.S. 513, 518, 520; *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 438; *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 124; *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30.

For example, in *Andrews*, *supra*, 373 U.S. at 340, the Court observed that [t]he "long-established rule against piecemeal appeals in federal cases and the overriding policy considerations upon which that rule is founded have been repeatedly emphasized by this Court [citing, *inter alia*, *Cobbledick*]."

though filed before the return of an indictment, was not separate from the main cause and thus not independently appealable: "Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent." 369 U.S. at 131–132. In reaching this result, the Court relied upon the *Cobbledick* principle that grand jury procedings "are parts of the federal prosecutorial system leading to a criminal trial" (369 U.S. at 131); it emphasized that postponing appeal until after conviction would not "frustrate the right of appellate review * * *" (*id.* at 125–126). And in a complementary context, the Court has reinforced the unique status of the grand jury and its power to engage in broad ranging investigations unfettered by litigious interruptions. Thus, the Court has precluded challenges to indictments as based on inadmissible evidence (*Costello* v. *United States,* 350 U.S. 359) or obtained in an unconstitutional manner (*Lawn* v. *United States* 355 U.S. 339). "Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment" which may have been presented to a grand jury, a defendant may not obtain dismissal of an indictment but "would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial." *United States* v. *Blue,* 384 U.S. 251, 255.

These developments in the years since *Cobbledick* give firm evidence of its continued vitality. Thus, had the district court in this case simply *refused to quash*

the subpoena, its decision would incontestably have amounted to no more than an interlocutory nonappealable order. There is no justification for disregarding the principle of *Cobbledick* because the district court in this case tempered its refusal to quash the subpoena with terms designed to make compliance by respondent less burdensome.

B. *The district court's order modifying the subpoena did not render the order appealable.*

In its order refusing to quash, the district court modified the subpoena, insofar as it demanded "the books of account, minute books and the list of members," to accommodate the restrictions of Kenyan law. In substance, the order provided that respondent need not produce these documents in Los Angeles unless his request for permission to do so was granted by the authorities in Kenya; if respondent was unable to obtain such permission, these papers need only be made available for inspection and copying in Kenya. The court below found that this abridgement of the subpoena transformed the order from a denial of the motion to quash into a "mandatory injunction" superseding the subpoena and having an appealable life of its own. It is literally true, we agree, that the modification did direct the respondent to take certain steps looking toward the production of the documents. But we can perceive no logical or practical sense in which the basic situation was changed; all that happened was that the subpoena's categorical directive to produce was replaced by the court's directive to do the best that the circumstances allowed by way of produc-

tion. Unless unrealistic formalism is to govern, the *Cobbledick* principle must control here as in any other situation where the issue is what evidence the grand jury is to be allowed to obtain, and therefore an appeal did not lie.

1. It is inherent in any subpoena *duces tecum* that the person called on to produce the records must take "affirmative action" of some kind to comply. If the books are maintained in a warehouse, he must get them out of the warehouse. If they are in the custody of another, he must ask that person to surrender them. If, for example, corporate records are stored in a bank vault, the officer ordered to produce them must secure the cooperation of the custodian of the vault, complying with applicable bank regulations. Sometimes, as where a subpoenaed individual has partial but not exclusive control over the desired records, considerable efforts may be necessary to establish good-faith compliance. See, *e.g., United States* v. *Fleischman,* 339 U.S. 349, 352–365, where the Court held that the subpoenaed members of the executive board of an association, who collectively had power to direct production of the subpoenaed records by the officer in whose custody they were (though none individually had the authority to do so), were required to meet and issue such an order.[10] Cf. *Wilson* v. *United States,* 221 U.S. 361, 376–377.

[10] *Fleischman* did not involve a grand jury subpoena and no question was involved as to the appealability of a refusal to quash. We refer to that case merely to illustrate the type of situation which could well arise and in which, in our view, an order refusing to quash would not be appealable even though

We think the bank vault illustration provides a useful analogy: Assume that in order to forestall foreseeable delay a federal district court in Los Angeles were to couple a refusal to quash a grand jury subpoena with a direction that the witness "shall forthwith make application to Bank X in New York City to release designated records and if permission is refused to permit agents of the grand jury to examine and copy the records at the Bank." It is hard for us to believe that in such a situation the otherwise unappealable order would be transformed into an order subject to review on the ground that "affirmative action" was commanded. On the contrary, it seems evident that the language of command in the hypothetical situation was simply meant to take account of foreseeable "footdragging" and to make explicit what was already implicit in the subpoena itself—that all reasonable efforts be taken to comply with its terms.[11]

a more than ordinary degree of affirmative action would be required for compliance.

A further example illustrates the fundamental proposition referred to in the text. If no implicit directives could be read into a subpoena, a corporation could presumably insulate its books and records from production simply by appointing as a custodian one who could assert the personal privilege against self-incrimination. Thus, through its own devices, a corporation could effectively assert the "personal" privilege against self-incrimination, cf. *United States* v. *Kordel*, 397 U.S. 1, 8, thereby evading the plain command of a subpoena and frustrating a grand jury investigation.

[11] Compare Mr. Justice Black's discussion of *Wilson* v. *United States*, 221 U.S. 361, in his dissenting opinion in *United States* v. *Fleischman*, *supra*, 339 U.S. at 369–370, in which he notes the importance of the factual context in analyzing the terms of a subpoena—particularly the special situation of grand jury proceedings.

The difference between the directive which we have postulated and the case at hand does not justify a different rule of appealability. We fail to perceive why the fact that "affirmative action" was required "to be taken in another country"—that respondent was directed to seek the permission of the foreign authorities for removal of certain of the records, or, if that failed, to make the records available for examination and copying by federal agents in Kenya—has any bearing on that question at all,[12] much less why it requires a conclusion favoring appealability. In short, given the particular circumstances of this case, the prescribed procedure—obviously aimed at taking account of objections raised by respondent at the hearings on the motion to quash and to afford him leeway in achieving compliance before the return date—was

[12] We further fail to understand why the court concluded that, if "given full effect," the order would "require action by officials of the Kenyan Government"—or even if it did why this was significant on the question of appealability. Any action that the government of Kenya might have taken pursuant to a request made on it by respondent would obviously have been wholly voluntary on its part; the district court did not—and could not—direct Kenyan authorities to do anything.

It is further immaterial that the records here sought by the grand jury (including those whose production did not require the Kenyan Government's approval) were maintained outside the United States. The courts of this country have power to order persons subject to their jurisdiction to produce in this country books and records, located in a foreign country, that are within the control of such persons. See, *e.g.*, *Societe Internationale* v. *Rogers*, 357 U.S. 197, 204–205; *United States* v. *First National City Bank*, 379 U.S. 378; *Securities and Exchange Commission* v. *Minas de Artemisa*, 150 F. 2d 215, 217 (C.A. 9).

simply a reasonable implementation of the subpoena and strictly in aid of it. See *National Nut Co. of California* v. *Kelling Nut Co.*, 134 F. 2d 532, 533 (C.A. 7).[13]

2. In holding the district court's entire order immediately appealable, the court of appeals disregarded the fact that its principal command was that respondent produce before the grand jury the records sought by the subpoena—in short that the dominant thrust of the order was simply to deny the motion to quash.[14] Surely that portion of the order which required no application to foreign authorities would under no theory have been subject to review if it had stood alone. Why

[13] Cf. *Securities and Exchange Commission* v. *Minas de Artemisa*, 150 F. 2d 215, 218–219 (C.A. 9), where a subpoena *duces tecum* requiring production within the United States of corporate records held in Mexico was ordered restructured to comply with Mexican law by providing that the officer ordered to produce them should seek Mexico's permission to remove any records whose removal would otherwise violate the laws of that country and that, should the requested permission be denied, he make the records available in Mexico for inspection by the subpoenaing party. Accord: *United States* v. *Ross*, 302 F. 2d 831, 834 (C.A. 2); *In re Investigation of World Arrangements, etc.*, 13 F.R.D. 280, 286–287 (D.D.C.). See also *Societe Internationale* v. *Rogers*, 357 U.S. 197, 205.

[14] Thus Part I of the district court's order denied the motion to quash and Part II directed compliance with regard to the records of the two companies in question—except as to "the books of account, minute books and the list of members"; only in Part III did the court modify the subpoena in a manner in which the court below deemed crucial on the question of appealability in providing the conditions regarding production of these specified records (A. 63–64). We think it fair to assume that had the district court stopped with Points I and II (the latter point having eliminated the records of certain companies from the reach of the subpoena) no appeal would have been allowed.

should it be any different because the court sought to provide flexibility in production as to the remainder?[15]

Following the logic of the court below, it would appear that any ameliorative or clarifying directive, if it directs some kind of "action" beyond the express terms of the subpoena, will render the entire subpoena appealable. Yet it is apparent that many situations will arise where such auxiliary orders are essential. In this case the basic aim of the district court was to afford leeway in achieving compliance; in other situations, the order may seek to make the subpoena more precise, thereby clarifying or perhaps narrowing the witness' duty. That a district judge be encouraged to exercise such power seems to us of paramount importance—if for no other reason than to protect a witness from overbroad or oppressive subpoenas.

If the opinion below is allowed to stand, a district judge, cognizant that any order on his part modifying a subpoena, no matter how subsidiary, may well be subject to immediate review, will obviously be reluc-

[15] *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, does not point in the other direction. That case—which involved no issue concerning appealability since the party seeking review had been found guilty of contempt—merely held that since a portion of the subpoena seeking pretrial discovery of government documents under the criminal discovery rules was bad, the defendant could not be held in contempt for refusing to comply with the subpoena even though the remainder may have been valid (see 341 U.S. at 221–222). The implications of *Bowman*, however, are that the district court in that case should and could have acted to remove the basis of invalidity.

tant to make any revision tailoring the subpoena's terms to the particular circumstances for fear of the delays in the grand jury's investigation that would flow from the interlocutory review. To place a district court in such a dilemma can aid neither the witness nor the government; it can only detract from the flexibility necessary to effective and fair criminal procedures.

3. The court of appeals' alacrity in converting the district court's order into an injunction appealable under 28 U.S.C. 1292(a)(1) is, moreover, inconsistent with the general policy of limited appealability governing interpretation of that statute. This court has made clear that Section 1292(a)(1) is to be given restrictive rather than broad application, consistent with the sound principle that ongoing litigation should not ordinarily be interrupted by interlocutory appeals. See, *e.g.*, *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 180–182. This principle was reemphasized in the Court's recent decision in *Switzerland Cheese Association, Inc.* v. *Horne's Market*, 385 U.S. 23, that an order denying a motion for summary judgment in a civil action was not appealable under Section 1292(a)(1). The Court significantly commented that "federal law expresses the policy against piecemeal appeals" and that it therefore approached "this statute somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders." 385 U.S. at 24. Reference to Section 1292(a)(1) accordingly reinforces the argument against appeal in this case. For as *Cobbledick* has

stressed, the reasons militating against review of interlocutory orders "are especially compelling in the administration of criminal justice." 309 U.S. at 325.[16] See *Younger* v. *Harris*, No. 2, this Term, decided February 23, 1971.

C. *There are no special circumstances in this case justifying a departure from the finality doctrine.*

We have so far focussed on the anomalous nature of the decision below, pointing out that it can only encourage the kind of delay which is "fatal to the vindication of the criminal law," *Cobbledick, supra*, 309 U.S. at 325, or else tend to inhibit the exercise by district courts of the discretion upon which the smooth and fair operation of our system of criminal justice so much depends. See, *e.g.*, *Palermo* v. *United States*, 360 U.S. 343, 353.

It may, however, be contended that this case involves a unique combination of factors that collectively call for special treatment, and that this uniqueness diminishes the threat to the *Cobbledick* principle. We shall endeavor to show that there is no reason for an exception here, and that the principle followed below does create a danger of broad application.

1. As we have already contended, the fact that efforts to obtain demanded records must be made on foreign

[16] The Ninth Circuit's reliance upon *Longshoremen* v. *Marine Trade Assn.*, 389 U.S. 64, is misplaced. That case involved the question whether an equitable order granting an injunction in a labor dispute (the violation of which resulted in the contempt finding) was sufficiently clear to warrant the civil contempt ruling. The decision did not purport to deal with Section 1292 (a)(1) or any question of interlocutory review.

rather than domestic soil is hardly a viable basis for a meaningful distinction on the issue of appealability (see *supra*, p. 18–19). Nor is the assertion that the records weighed 2,000 pounds rather than a lesser amount relevant to that question. There is, furthermore, a real danger inherent in the court of appeals' attempted distinction between this case and its earlier holding against appealability in *Lampman, supra,* on the ground that the order in that case "cannot be fairly compared, in breadth, reach, or overseas effect, to the one that is now before us" (A. 72, n. 1). Such distinctions are easily asserted in the abstract but are difficult of practical application consistent with appellate restraint. They do not create a readily identifiable class of cases as to which appeals will be allowed, and accordingly invite litigation of the issue, and attendant stays, in an especially wide class of cases.

2. The further point may be made that the investigative process of the grand jury was not substantially disrupted in this case since the court of appeals decided not to restrain enforcement of the district court's order pending appeal.[17] The contempt proceeding itself has, however, been delayed since October 20, 1969, on application of respondent, and has thus remained in abeyance for almost a year and a half; the documents have, of course, not been produced. From no point of view has fair resolution of the issues in the contempt proceedings been aided or

[17] It should be noted, however, that the court of appeals did postpone the return date for a period of nearly two weeks due to the delay occasioned by the application for extraordinary relief. See *supra*, p. 4.

expedited by this 17-month maintenance of the status quo; the opposite has been true.

In any event, the fact that the court of appeals in this case decided in its discretion against granting a stay pending the appeal is hardly a guarantee that other courts, in comparable situations, would not stay proceedings in other cases. On the contrary, if the order at issue here is found to be appealable, it can be predicted with fair assurance that stays will regularly be sought and often obtained. Many will appeal who, if put to the test of risking citation for contempt, would acknowledge the correctness of the enforcement order and produce the records commanded. Indeed, with the fear of a contempt citation removed, appeals may be used simply as instruments of delay. Given the short life of the grand jury (18 months at the longest, Rule 6(g), F. R. Crim. P.) relative to the life expectancy of an appeal (here almost two years in the court of appeals alone), it will often be possible to frustrate the demand for information entirely. And, even if interim relief is denied, the mere pendency of an appeal challenging the validity of a district court's order could substantially diminish the fear that non-compliance would result in punishment.[18]

[18] We note further that any rule which permitted an appeal from an order entered prior to a contempt order would leave the door open for a witness to prosecute two appeals on identical issues. A recalcitrant witness might appeal from the first order and, if unsuccessful, might continue to refuse to comply with the order and appeal from an order adjudging him in contempt. As a consequence, there could be two appeals on

3. We are thus forced to the conclusion that the court below held the instant order appealable simply because it deemed the subpoena oppressive and unfair. Whether it was or not (we discuss why it was not in Point II, *infra*), this is surely no basis for holding it to be appealable. It cannot be argued "that a judge has no 'power' to enter an erroneous order. Acceptance of this semantic fallacy would undermine the settled limitations upon the power of an appellate court to review interlocutory orders." *Will* v. *United States*, 389 U.S. 90, 98, n. 6.[19] As *Cobbledick makes* clear: "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." 309 U.S. at 325.[20] "Courts * * *

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issues which could be fully disposed of on appeal of the final order adjudging him in contempt. Ordinarily such a possibility would appear to be more fanciful than real. However, in the case of grand jury investigations, it would provide an opportunity to obstruct justice and pose a real danger. Compare *Younger* v. *Harris*, No. 2, this Term, decided February 23, 1971, where, in reaffirming the traditional rule against federal court intervention in state criminal prosecutions, the Court recognized that a fundamental reason for the rule was to "avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted" (slip op. 6).

[19] The Court in *Will* (389 U.S. at 98 n. 6) further quoted with approval Mr. Justice Douglas' remarks in dissent in *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, 225, that "[c]ertainly Congress knew that some interlocutory orders might be erroneous when it chose to make them non-reviewable."

[20] Undergoing a criminal prosecution thus cannot be a basis for bringing this case within the small category of situations where important rights, collateral and discrete from the main cause, require immediate review. See, *e.g.*, *Cohen* v. *Beneficial*

must be careful lest they suffer themselves to be misled by labels * * * into interlocutory review of nonappealable orders on the mere ground that they may be erroneous" (*Will* v. *United States, supra,* 389 U.S. at 98 n. 6).[21] "The Supreme Court scarcely intended that the important policy pronouncements in Cobbledick and Di Bella could be side-stepped by baptizing a motion to quash as one to enjoin the prosecutor from enforcing a subpoena, or a motion to suppress as one for an injunction restraining the use of the evidence and mandating its return * * *." *In re Grand Jury Investigation of Violations, supra,* 318 F. 2d at 536.

II.

ASSUMING ARGUENDO THAT THE ORDER WAS APPEALABLE, THE COURT BELOW ERRED IN HOLDING IT INVALID.

Our central concern with the decision below (as we noted in our petition for certiorari, pp. 8–9 n. 8) is the potential adverse impact of its holding on appeal-

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Loan Corporation, 337 U.S. 541. Indeed, at the core of these decisions is the consideration of "the likelihood that review will be ineffective if delayed." See Note, *Appealability in the Federal Courts*, 75 Harv. L. Rev. 351, 364 (1961). There is nothing to suggest that such will be the case here if the contempt proceeding is allowed to proceed and results in a finding of contempt against respondent.

[21] That warning, given in another context, is telling here. Just as mandamus and the other extraordinary writs may not be employed as substitutes for appeal in derogation of a clear congressional policy against allowance of review, *Will* v. *United States, supra,* 389 U.S. at 97; *Parr* v. *United States,* 351 U.S. 513, 520–521; *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21, 30–31; cf. *Fong Foo* v. *United States,* 369 U.S. 141, so the prohibition against appeals from defined types of orders is not to be circumvented by calling them by other names.

ability. We have detailed our reasons for this view in Point I of this brief, and would urge the Court to reverse on this ground without reaching the merits. Nevertheless, the court below did reach the merits [22] and, accordingly, we deem it appropriate to deal briefly with the substance of its ruling.

1. As originally issued, the grand jury subpoena required the production of all records pertaining to five named entities—Ryan Investments, Ltd., Mawingo, Ltd., the Mount Kenya Safari Club, Zimmerman, Ltd., and the Seven-Up Bottling Co. (Kenya), Ltd. (A. 11–12). In an affidavit submitted in support of the motion to quash the subpoena, John Mills, a director of three of these companies (Ryan Investments, Mawingo, and Zimmerman), attested that on the basis of his personal knowledge of the records of the first four entities named (all except the Seven-Up Bottling Co.) it was his opinion that the records would fill approximately eight four-drawer filing cabinets and weigh approximately 2,000 pounds (1 R. 45). This statement was the apparent basis of respondent's later claim in these proceedings that the records ordered produced would weigh 2,000 pounds, and apparently was one of the factors which impelled the court below to rule that the subpoena was oppressive in scope.

We point out initially that the government had offered during the proceedings to relieve respondent

[22] There is, of course, no reason for this Court to reach the merits simply because the court of appeals did. If the court below is thus found to have acted without jurisdiction, its substantive rulings could not have any binding force on the district court. See, *e.g.*, *Carroll* v. *United States*, 354 U.S. 394.

of the necessity for transporting any of the subpoenaed records to Los Angeles, by having federal agents, on the grand jury's behalf, inspect them in Kenya and copy those that were deemed necessary; the court had indicated its willingness to include the substance of that proposal in its order. Having declined the offers (*supra*, p. 4), respondent is hardly in a position to argue that the order imposed an unreasonable transportation burden.

At all events, whatever might be said as to the burden of the subpoena standing alone, it was surely made reasonable in scope by the narrowing order of the district court. It appeared from other statements in Mills' affidavit (and in a second affidavit submitted in support of the motion to quash by one John Story, a Kenyan accountant) that Ryan Investments was incorporated on December 6, 1961; that Mawingo was incorporated on June 5, 1938; that the Mount Kenya Safari Club was a wholly owned affiliate of Mawingo, with no separate corporate existence; and that the Safari Club "began to be operated by its owner Mawingo" on May 20, 1963 (1 R. 40–41, 45). In its answering memorandum, the government noted that Ryan Investments had been in existence only since December 1961 and that it had been established through grand jury testimony that respondent "became involved with the Mount Kenya Safari Club, dba Mawingo Limited [*sic*]" in January 1959. It argued that "[t]hese dates clearly show that the records covered by the subpoena do not envelop an unreasonable period of time," and suggested that in the inter-

est of clarity the subpoena should be modified to "specifically include these dates which have not been challenged by Mr. Ryan" (1 R. 68).

Although the district court did not literally incorporate the government's suggested modification, it did incorporate the substance of that proposal. In addition to eliminating entirely the reference to the records of two of the designated companies (Zimmerman, Ltd. and the Seven-Up Bottling Co.), the court significantly varied the references to the other three entities. Whereas the subpoena had referred to Ryan Investments, Mawingo, and the Mount Kenya Safari Club as separate organizations, the order omitted reference to the Mount Kenya Safari Club as a separate entity and qualified the reference to Mawingo with the words "doing business as the Mount Kenya Safari Club" (A. 63–64). Thus, instead of calling for all the records of Mawingo, as the subpoena had, the order directed the production of only those records of Mawingo that were pertinent to the period during which it had done business as the Mount Kenya Safari Club. Whether that period commenced in May 1963 (when according to the affidavit of Mills the Safari Club began to be operated by Mawingo) or in January 1959 (when according to the evidence referred to in the government's memorandum respondent had become involved with the Club), it covered, at most, a span of nine and a half years. The actual facts therefore do not bear out the unequivocal assertion of the court below that "[t]he Government conceded that the subpoena itself was overly broad, but the District Court

did not undertake to clarify it or to limit it, except to remove only a few documents from its attempted operation" (A. 73).

Fairly interpreted, the district court's order required the production of all of the records of one company, Ryan Investments, which had been in existence for less than seven years, and the post-1958 records (at most) of another company, Mawingo, covering a period of under ten years. This was not an oppressive or unreasonable demand.[23] Cf. *Petition of Borden Co.*, 75 F. Supp. 857 (N.D. Ill.) (grand jury subpoena calling for production of 50 tons of records, covering 20-year period, sustained); *In re United Shoe Machinery Corporation*, 7 F.R.D. 756 (D. Mass.) (subpoena for "huge quantities of materials" sustained; pertinent time period reduced from 27 to ten years); *Application of Radio Corporation of America*, 13 F.R.D. 167 (S.D.N.Y.) (18 years); *In re Eastman Kodak Co.*, 7 F.R.D. 760 (W.D.N.Y.) (ten years).

Against this background, the fact that the order did not further limit the subpoena by specifically delineating the precise type of records to be produced did not render it unreasonable.[24] The application of any such

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[23] Moreover, since Mills' estimate of 2,000 pounds had included the records of Zimmerman, Ltd. (which, as noted, were excluded from the final directive) as well as the records pertaining to all 30 years of Mawingo's existence, it is apparent that the documents actually ordered produced by the district court weighed substantially less than that figure.

[24] "The fact that all of the records are demanded does not in and of itself make the subpoena unreasonable or oppressive." *Application of Certain Chinese Family B. & D. Ass'ns.*, 19 F.R.D. 97, 100 (N.D. Cal.).

per se rule would clash with the "broad investigatorial powers [of grand juries] into what may be found to be offenses against federal criminal law." *United States* v. *Johnson,* 319 U.S. 503, 510. There may, of course, be situations where the breadth of the request is so sweeping as to be unreasonable. But such a decision "turns not on any legal absolutism but on evaluative impression." *Schwimmer* v. *United States,* 232 F. 2d 855, 861 n. 3 (C.A. 8), certiorari denied, 352 U.S. 833. Under that standard, this case is not comparable to *Hale* v. *Henkel,* 201 U.S. 43, 76–77. That case involved an antitrust investigation where the subpoena demanded production of all documents passing between one corporation and six other different companies, in addition to all correspondence by the corporation, since its organization, with more than a dozen other companies (including the American Tobacco Company). See *Brown* v. *United States,* 276 U.S. 134, 142. A demand for all the records of a huge company may well render a subpoena vulnerable; on the other hand, where, as here, the companies involved are relatively small, and the order of the court limits the demand, the subpoena is not subject to the same defect.

2. There is similarly no merit to the court of appeals' suggestion that the order was defective for failing to state "with sufficient particularity what Ryan was expected to do" (A. 72). The court did not explain in what way it thought the order insufficiently precise and we are not aware that respondent complained that the order was too vague to guide

good-faith compliance. The order directed respondent to produce before the grand jury in Los Angeles the records of the two designated companies with the exception of records of three specified types (the account books, minute books, and membership lists); to request permission from the Kenyan Registrar of Companies to remove the excepted records from Kenya so as to enable him to produce those too before the grand jury; and, in the event he was unable to secure such permission, to make those particularly described records available to Justice and Treasury Department agents for inspection and copying in Kenya. In short, it was precise and clear.

CONCLUSION

If the Court agrees with the government's contentions discussed in Point I, *supra* pp. 9–26, that the order of the district court was interlocutory and nonappealable, then the judgment below should be vacated and the cause remanded with directions to dismiss the appeal. If the Court concludes that the order was independently appealable, then, for the reasons set forth in Point II, *supra* pp. 26–32, the judgment below should be reversed.

Respectfully submitted.

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MARCH 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 758

UNITED STATES OF AMERICA, *Petitioner*

v.

RAYMOND J. RYAN

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 758

UNITED STATES OF AMERICA, *Petitioner*

v.

RAYMOND J. RYAN

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether an oppressive and imprecise district court order denying respondent's motion to quash a grand jury subpoena duces tecum *and* directing respondent (1) to produce substantially all the "books, records, papers and documents" of two Kenya corporations, (2) to apply to the Registrar of Companies of Kenya

for release of certain records subject to restrictions imposed by Kenya law, and, (3) if such application be denied, to make the records "available to agents of the United States Department of Justice and/or the United States Department of the Treasury" for inspection and copying in Kenya is nonappealable under *Cobbledick* v. *United States*, 309 U.S. 323 (1940), as a denial of a motion to quash a grand jury subpoena duces tecum.[1]

STATEMENT

1. Background

Raymond J. Ryan is a United States citizen who traveled to the United States voluntarily from Kenya, East Africa, to be the principal government witness in a highly celebrated federal criminal trial in 1964. *United States* v. *Marshall*, 355 F.2d 999 (9th Cir.), certiorari denied, 385 U.S. 815 (1966). As a result of the publicity given that trial, Mr. Ryan became the target of an extensive investigation by the Internal Revenue Service. Agents of the Internal Revenue Service were given access, at their request, to the full records of a company owned by Mr. Ryan, and they physically moved into the offices of the company (A. 5). After examining the records of that company and others in which Mr. Ryan had an interest located in California, the Special Agent of the Internal Revenue

[1] Petitioner has included in its brief on the merits a second Question Presented—*i.e.*, "Whether the court of appeals erred in holding the order invalid." That question was not preserved in the petition for certiorari (having been mentioned only in passing in a footnote in the argument, Pet. 8, n. 8), and we believe it is not properly before the Court. See *e.g.*, *Irvine* v. *California*, 347 U.S. 128, 129 (1954). In other words, if the Court affirms the conclusion of the court of appeals that the challenged order is appealable, it should not re-examine the court of appeals' conclusion that the order was void.

Service in charge of the tax investigation wrote a letter to Mr. Ryan, who was then in Kenya, expressing his appreciation for the cooperation theretofore given in the investigation and advising that the IRS also wished to have the opportunity "to examine records relating to your business ventures in Kenya." The letter stated that an IRS representative would be sent to Kenya to examine the records of such business ventures and requested an "assurance that the applicable records will be made available to the examining agent" (A. 24-25). There was no specification in the letter of the "business ventures" in which the IRS agent was interested.

2. The IRS Summonses

On November 18, 1966, an Internal Revenue Service summons was served upon Mr. Ryan's attorney, one Wilbur Dassel (now deceased), requesting the production of substantially all the records of three enumerated Kenya companies—the Mount Kenya Safari Club, Ryan Investments, Ltd., and Mawingo, Ltd.—for the years 1959-1963, 1961-1965, and 1959-1965, respectively (A. 26-35). Mr. Ryan submitted a statement to the IRS in response to this summons and stated therein that the records enumerated in the three extensive attachments to the summons were not within his custody and control (A. 5). He undertook to make a trip to Kenya to obtain the records and reported that his effort had been unsuccessful (A. 5).[2]

On November 21, 1967, another IRS summons was served on Mr. Ryan requesting the production of 1965

[2] In March 1967, Mr. Ryan submitted to the IRS an affidavit reporting the effort he had made and requesting to be relieved from the summons. The affidavit appears in Volume I of the certified record of this case at pages 73-74 and is reproduced in Appendix A to this brief, pp. 3a-5a, *infra*.

records of the Ryan Oil Company, bank records relating the three Kenya companies, and records relating to Mr. Ryan's personal accounts in banks located in the Kenya cities of Nanyuki and Nairobi (A. 20-22).

No steps have even been taken by the government to enforce either of the Internal Revenue Service summonses.

3. The 1967 Grand Jury Subpoenas

On July 27, 1967, while Mr. Ryan was in the United States, he was served with a grand jury subpoena directing him to appear before a federal grand jury on July 28, 1967, and to bring with him "all records, papers and documents pertaining to the operation of Mawingo, Ltd. dba Mount Kenya Safari Club" (A. 15-16). Such of the enumerated records as were available in California were then turned over to Internal Revenue agents (A. 6). A similar subpoena dated August 2, 1967, was thereafter left at Mr. Ryan's office, requesting his appearance and the production of the company records on August 16, 1967 (A. 17-18). Two of Mr. Ryan's employees who were served at the same time appeared on August 16 and testified, and Mr. Ryan was excused by agreement between counsel until some indefinite future date (A. 6).

4. The March 1968 Appearance

Under date of February 2, 1968, the Department of Justice advised Mr. Ryan's attorney by letter that Ryan's presence pursuant to the August 1967 proceeding was requested for February 21, 1968 (A. 23). Since counsel had a conflicting commitment for the February 21 date, it was agreed that Mr. Ryan would appear on March 5, 1968. Mr. Ryan, who was then living in Kenya, returned to the United States at his own expense to be present on March 5.

In a hearing held that morning in the district court, government counsel described what took place in the grand jury room as follows (Transcript of March 5, 1968, pp. 7-8):

> Mr. Joyce: When Mr. Ryan was called into the grand jury he was first called in and sworn and then released and permitted to proceed to the witness room. Then another witness, Mr. William Holden, was called before the grand jury. He described the acquisition of the property known as the Mt. Kenya Safari Company and the acquisition of the stock of the Mawingo Company, Ltd. 80 per cent of the stock was acquired by Mr. Ryan, 10 per cent by Mr. Holden and 10 per cent by Mr. Carl Hershman. [*sic*]
>
> Mr. Holden testified that although he is nominally president of the corporation and Mr. Ryan is the vice president that he as president does not have custody and control over the records but that Mr. Ryan does have such custody and control over the records.[3]

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[3] Mr. Holden's grand jury testimony was subsequently introduced as Government's Exhibit 4 (R. Vol. III, p. 133). An examination of that transcript does not provide any support for the representation made to the court on March 5 that Holden had testified that "Mr. Ryan does have such custody and control over the records." The relevant portion of the Holden testimony was as follows (Ex. 4, pp. 11-12):

> Q. As the President, are you the custodian of the records, the financial records of the Mawingo Limited?
>
> A. No, I am not.
>
> Q. Are there any other officers in the corporation, sir?
>
> A. The designated officers—well, I was designated as President. Mr. Ryan was designated as Vice-President, and Mr. Hirschmann was designated as Secretary-Treasurer.
>
> Q. You say you were designated by yourselves?
>
> A. Yes. We agreed among ourselves.
>
> Q. I didn't hear what was Mr. Hirschmann's—
>
> A. As Treasurer.
>
> Q. Now, do you know who the custodian for the records of

> Mr. Ryan was then brought into the grand jury and asked if he was appearing before the grand jury pursuant to subpoena to bring the records of the corporation before the grand jury. His response was that upon the advice of counsel he refused to answer the question on the ground that the question would tend to incriminate him. He responded in that manner to each and every question directed to him with respect to the production of the corporation records.

He then made the following request (*ibid.*):

> At this point, your Honor, we would respectfully request that the court order the witness to produce before the grand jury on or about April 15, or such other time as the court may direct, the records of the Mawingo, Ltd. doing business as the Mt. Kenya Safari Company. That the corporate rec-

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the Mawingo Limited would be in accordance with your designations and arrangements, sir?

A. I am sure that the custodian of the records is Ryan Investments in Nairobi.

Q. You say Ryan Investments. That would be a corporation?

A. Yes, that's a corporation.

Q. And, who would the person be who would be the custodian of records? It would be difficult for—

A. Mr. Jack Mills who is General Manager of Ryan Investments.

Q. And, he is the custodian of the records?

A. As far as I know, yes.

Subsequently, Mr. Holden was again asked about the affairs of the Mt. Kenya Safari Club (Ex. 4, p. 21):

> Mr. Michael: Were the business affairs—as far as you know, were the business affairs of this club run by yourself, Mr. Hirschmann and Mr. Ryan?
>
> The Witness: Well, actually—
>
> Mr. Michael: As far as giving orders and setting policy?
>
> The Witness: The business affairs were always in the hands of either the attorneys in Nairobi or Mr. Jack Mills who is General Manager of Ryan Investment.

ords be brought from wherever they are to the United States and brought before the grand jury. And that the court direct that he so do upon the pain of either an indictment by the grand jury for contempt of the order of the court or the penalties of civil contempt for refusing to comply with the order of the court. We would so ask the court to direct him at this point.

After further colloquy, the court inquired of government counsel whether he was requesting "this court to order Mr. Ryan to answer questions concerning the records or whether you want this court to order Mr. Ryan to produce those records?" (A. 8). Counsel advised that the government did not "anticipate taking any testimony from Mr. Ryan except insofar as he will identify the records and state his position as the custodian" (*ibid.*) The district judge concluded that he could not order Mr. Ryan to produce records, and that the "proper procedure to do that would be by subpoena rather than by order of the court" (A. 9). Government counsel immediately whipped out a subpoena duces tecum calling for Mr. Ryan's attendance before the grand jury on April 15 (A. 11) and served it upon Ryan in open court. (That subpoena is the one allegedly at issue here.) He then requested the court to issue an order directing Mr. Ryan to comply with the subpoena. The district judge denied that request as premature (*ibid.*).

5. The Terms of the Subpoena

The grand jury subpoena served on March 5 was broader in scope than any of the previous requests for records of business ventures in Kenya. It sought "all books, records, papers, and documents in [Ryan's] possession or under [his] custody and/or control,

either personally or as corporate officer, director, or representative," pertaining to the following five "entities, enterprises or corporations" (A. 11-12):

1. Ryan Investment, Ltd., Nairobi
2. Mount Kenya Safari Club, Nanyuki and Nairobi
3. Mawingo, Ltd., Nanyuki and Nairobi
4. Zimmerman, Ltd., Nairobi
5. Seven-Up Bottling Co., Ltd., Nairobi

It described the documents as "including but not limited to checkbooks, books of accounting, disbursement journals, and any and all correspondence relating to these five entities" (*ibid.*).

6. The Motion To Quash

On March 29, 1968, Mr. Ryan's counsel filed a motion to quash the subpoena on seven different grounds.[4]

[4] The following grounds were stated and argued in the supporting memorandum:

1. "The subpoena being unlimited in time and subject matter is oppressive, unreasonable and violative of the Fourth Amendment to the Constitution.
2. "The witness Ryan was immune from service of the subpoena.
3. "The subpoena commands an unlawful act under the laws of Kenya and consequently must be quashed.
4. "The grand jury subpoena is an improper attempt to use the processes of the grand jury to enforce an Internal Revenue summons.
5. "The witness not having custody or control of the documents, the subpoena must be quashed.
6. "Requiring the witness to be responsible for shipping substantial quantities of records from Africa to Los Angeles is oppressive and unlawful.
7. "Since the government has "targeted" Ryan, he should not be compelled to be a witness."

The principal reason stated was that the subpoena was oppressive and unreasonable, and it was also argued that Mr. Ryan was immune from service of process on March 5, 1968, and that it would violate Kenya law to require the records to be transported to the United States. The motion was supported by several affidavits, among them being that of a partner in a Nairobi law firm who stated his opinion that Mr. Ryan's compliance with the subpoena would violate Kenya law (A. 36-38). Other affidavits were submitted by the secretary and a director of three of the companies (R. Vol. I, pp. 39-41, 44-47; reprinted in Appendix B, pp. 6a-10a, *infra*), who stated, *inter alia,* that the records requested "would fill aproximately eight four-door filing cabinets and would weigh approximately 2,000 lbs," that Mr. Ryan had resigned as director of the companies in March 1967 and retained no official capacity with them, that the executive director of the companies (one of the affiants) has custody and control of nearly all the requested records, that Mr. Ryan has neither custody nor "the right to determine to whom the records should be made available," and that requests made by Ryan to have the records sent to California had been turned down.

7. District Court Proceedings

The motion to quash and other issues relating to the government's wish to examine the Kenya documents were the subjects of proceedings in the district court on five dates between April and July 1968. (See Vol. III of the Certified Record.) Mr. Ryan's counsel raised, in oral argument, the fact that the Judicial Code prescribed specific means for obtaining documents located abroad (by subpoena duces tecum under 28 U.S.C. § 1783 and by letters rogatory) which the

government had failed to follow here (R. Vol. III, pp. 70-77), and he observed that with respect to much of the documentary material subpoenaed, removal from Kenya would violate local law (*id.* at 77-79).

He also noted that "there is a question of the capability and the competency of Mr. Ryan to comply with this subpoena" (A. 48), to which the district judge replied that "it is a factual issue" (*ibid.*). In the course of later colloquy, the district judge inquired of government counsel why he was not attempting to obtain the Kenya documents by letters rogatory, and the judge was told—to the surprise of Mr. Ryan's attorney—that the government believed that the Attorney General of Kenya would refuse to cooperate with such a request because of an alleged "close relationship with Mr. Ryan" (A. 49). Two days later "certain cablegrams from the State Department" were submitted to the court for *in camera* inspection in this regard and were "not disclosed to Ryan or his counsel" (A. 73).[5]

Government counsel argued to the district court that Ryan "has a burden of showing or proving the necessity for the remedy which is to quash the subpoena in this case" (R. Vol. III, p. 138).[6] In response

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[5] The opinion of the Court of Appeals which is now on review here referred to this information alleging "Ryan's improper influence upon the Attorney General of Kenya." The court, acting on the record before it, dismissed "the insinuation that the authorities of a friendly foreign power are subject to corruption" (A. 73). Apparently embarrassed with its allegations, the government moved in the Court of Appeals to withhold and strike that portion of the opinion. See Appendix C, pp. 11a-16a, *infra*. The motion was denied.

[6] This argument was made notwithstanding counsel's earlier remark that he "did not understand that this would be an evidentiary hearing" (R. Vol. III, p. 137).

to the government's argument that "there has been no showing on the part of the witness Ryan of any facts which warrant any relief under these circumstances" (*id.* at 139), the district judge said to respondent's counsel, "You have not convinced me yet, I want you to put in everything you want to put in" (*id.* at 140).

On July 12 (the date the "secret" documents were presented to the court), the district judge advised the parties of his "feeling" that Ryan had control of the records and read the language of a proposed order (A. 54-55). The substance of that order was reaffirmed orally on July 25 (A. 59-62), when the written order now at issue was signed (A. 63-64).

8. The Terms of the Order

The order signed by the district judge contained a finding that Mr. Ryan "before and after commencement of the investigation by the Treasury Department and the Department of Justice has had control" of the records and followed that finding with three operative paragraphs which provided as follows:

(a) The first paragraph recited that the motion to quash was denied.

(b) The second paragraph ordered Mr. Ryan to produce before the grand jury on September 11, 1968, the documents of three of the companies enumerated in the subpoena[7] as to which there had been no claim made of violation of foreign law.

(c) The third paragraph directed Mr. Ryan to apply "forthwith" to the Registrar of Companies in Kenya

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[7] The judge advised that he could not order production of the remaining two companies' records because he had received no evidence concerning them (A. 59).

to release the books of account, minute books and membership list for production before the grand jury on September 11, 1968, and, failing the receipt of such permission, to "make available to agents of the United States Department of Justice and/or the United States Department of the Treasury" the enumerated records in Kenya for inspection and copying. A timely notice of appeal from this order was filed (A. 65).

9. The September 1968 Appearance[8]

In addition to noting an appeal from the order of July 25, respondent sought extraordinary relief in the nature of prohibition and a stay from the Court of Appeals. That relief was denied, but the date for Mr. Ryan's appearance before the grand jury was continued to September 23, 1968. An application for a stay made to the Circuit Justice was also denied.

Mr. Ryan then appeared before the grand jury on September 23, 1968, without the requested records. Prior to his appearance, his attorney provided government counsel with a letter outlining the efforts made by Ryan to obtain the desired documents as well as a power of attorney—made out to the Attorney General or his delegate—assigning all right and interest that Mr. Ryan had in the documents (p. 17a-18a, *infra*). During his appearance before the grand jury he was, according to government counsel, "interrogated as to

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[8] Since the proceedings subsequent to the filing of the notice of appeal are relevant in determining the nature of the order under review, we include in our Statement—as did the government—a summary of those proceedings. The transcripts are not a part of the formal certified record, but pursuant to agreement between the parties they are being lodged with the Clerk and the portions which respondent deems particularly relevant appear in Appendix D to this brief, pp. 17a-62a, *infra*.

whether he complied with the order of the court," and he responded by invoking the constitutional privilege against self-incrimination (p. 17a, *infra*).

10. Institution of Civil Contempt

On the morning of September 23, Mr. Ryan's counsel was served by government attorneys with an order to show cause why Mr. Ryan should not be held in civil contempt. After colloquy among counsel and the court—in the course of which the district judge indicated that, in his view, the only defense available in the contempt proceeding would be demonstrated inability to comply arising "after the order" (p. 19a, *infra*)—the hearing on the order to show cause was set for October 2, 1968.

At the hearing of October 2, there was substantial discussion concerning the precise nature of the alleged contempt. Respondent's counsel inquired whether the violation related to the subpoena, the district court's oral instruction or the court's written order (p. 20a, *infra*). The district judge and the government attorney thereafter engaged in a discussion of the precise nature of the charge, in the course of which the following was said pp. 24a-25a, *infra*):

> "The Court: You don't give him notice that it is the modified—or the order of the Court. Here you say that you want an application for an order to show cause as to why he should not be held in contempt for failure to comply with the demands of the subpoena duces tecum.
>
> Well, it isn't the demands of the subpoena duces tecum that he was under order to comply with at the time of the order of the Court. It was certain portions of that subpoena duces tecum, and the subpoena duces tecum was used by the Court only in terms of reference to certain documents which

were set forth therein, not to the subpoena in its entirety.

Mr. Michael: Well, your Honor, our position is that the subpoena stands as the Court order modified it, and that subpoena has not been changed, it's been altered by the Court's order, and the Court's order refers to the subpoena, and it is specific.

The Court: Mr. Ryan is under specific orders of the Court—not to comply with the subpoena, but to do certain things, and that was the order of the Court. And if it did anything, it supplanted the subpoena duces tecum because the order of the Court made orally to him, which I think there was no question about, he was asked if he understood it, as I recall—

Mr. Michael: That's right, your Honor.

The Court: —and he said he did, and the order was pronounced in his presence as to what he was to do.

Mr. Michael: That's correct.

The Court: And it would be that order that would be the subject of any contempt, not the subpoena duces tecum because the order of the Court supplanted the subpoena duces tecum; and I think he is entitled to have that spelled out."

11. Evidentiary Proceedings

In order to prepare a defense to the contempt proceeding, respondent requested leave to take testimony in Kenya by letters rogatory (by way of deposition on written interrogatories) and that motion was granted with leave to the government to submit cross interrogatories (p. 32a, *infra*). The testimony of two witnesses was also taken before the district judge on October 7, 1968, and December 12, 1968 (pp. 30a-31a, 46a-53a, *infra*).

12. Indictment and Institution of Criminal Contempt

While the evidentiary phase of the civil contempt proceeding was being conducted, the federal grand jury for the Central District of California returned a two-count indictment on December 10, 1968, charging Mr. Ryan with conspiracy and obstruction of justice in relation to the production of records of The Mount Kenya Safari Club.[9] Also on December 10, 1968, on the government's motion, the district judge signed an order amending the earlier show-cause order from civil to criminal contempt (p. 39a, *infra*). In colloquy with counsel on December 12, the district judge made it clear that the contempt proceeding—set for December 16—was not to involve "relitigation" of any of the premises of the order. He said, "that has been litigated, whether or not he had the capacity to get the records prior to the date upon which he was ordered" (pp. 40a-41a, *infra*). He amplified this statement by saying, "the performance [*sic*] of his capacity is only after the order" (p. 41a, *infra*).

13. Consolidation of the Indictment and Contempt

On the suggestion of the district judge before whom the contempt charge was pending (Real, J.), the obstruction-of-justice charge and the contempt case were consolidated in January 1969 and assigned to him (pp. 53a-54a, *infra*). Thereafter, in February, the government filed an amended order to show cause in which it specified that the portion of the order allegedly violated by Mr. Ryan on September 23, 1968, pertained not to the documents whose removal would have violated

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[9] Respondent was found guilty on July 23, 1970, on one count of that indictment, and his judgment of conviction is now on appeal to the United States Court of Appeals for the Ninth Circuit.

Kenya law, but only to the briefs, records, papers and documents other than the books of account, minute books and membership lists (p. 55a, *infra*). There was still, however, no specification as to whether respondent was charged with having violated the written or oral order of the Court (pp. 56a-58a, *infra*) and in colloquy with counsel, the district judge did not clarify the question (p. 58a, *infra*).

14. Appellate Stays of the Trial

The district judge thereafter set December 2, 1969, as the trial date for the consolidated cases. Respondent filed with the court of appeals for a stay of the trial on the contempt charge pending the outcome of the appeal from the order of July 25, 1968, and the application was granted on October 20, 1969. The Court of Appeals' order recited the docket number of the obstruction-of-justice case in its order, and the district judge, concluding that the number had been erroneously transcribed—interpreted the order as applicable only to the contempt case (A. 70). He thereupon set the obstruction-of-justice case for trial in January 1970 (*ibid.*). The court of appeals on the respondent's motion for clarification, indicated that its specification of the obstruction-of-justice docket number had been deliberate and stayed the trial of both cases.

15. The Decision of the Court of Appeals

On May 19, 1970, a unanimous court of appeals in a *per curiam* decision held that the order was appealable as an interlocutory injunction because it directed "that affirmative action be undertaken in another country" (A. 72), and, noting that other arguments which it did not reach were "persuasive", it concluded that

the order was vague and oppressive (A. 72-73). The court thereafter denied petitions to withhold certain portions of the opinion from publication (see pp. 11a-16a, *infra*) and a petition for rehearing *en banc*.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Cobbledick* v. *United States*, 309 U.S. 323 (1940), this Court held that a district court order denying a motion to quash a grand jury subpoena duces tecum is not a "final decision" within the meaning of the predecessor to the present 28 U.S. C. § 1291. The Court's reasoning in *Cobbledick* was simple and straightforward. Noting that "judicial administration must not be leaden-footed" if it is to be effective and that "encouragement of delay is fatal to the vindication of the criminal law" (309 U.S. at 325), the Court held that a witness summoned before a grand jury is in the same posture as a witness at trial, and that neither may be permitted to cause "undue interruption" in ongoing proceedings by obtaining appellate review of an order refusing to excuse him from testifying. Relying on *Alexander* v. *United States*, 201 U.S. 117 (1906), which had concluded that an order to testify and produce documents before a court examiner was not appealable, the Court concluded in *Cobbledick* that the harm of halting "further judicial inquiry" (*id.* at 330) justifies withholding appellate review until such time as a subpoenaed witness appears and, if he then refuses to comply with the demand, is cited for contempt.

The government contends that the *Alexander* and *Cobbledick* decisions preclude appellate review of the order entered by the district court in this case. The basis for this claim is, essentially, that the district court did no more than enforce a subpoena and that

the other provisions of the order were merely ancillary to that enforcement. In fact, an analysis of the subpoena and the order demonstrate that they went far beyond the bounds of a subpoena duces tecum as that instrument has always been known to the common law and were, instead, devices whereby an individual was being ordered to engage in conduct which would make certain foreign documents more accessible to government agents. In these circumstances, the order of the district court was not covered by the *Alexander-Cobbledick* rationale, but was, rather, a mandatory injunction appealable immediately under 28 U.S.C. § 1291 or § 1292(a)(1).

1. Notwithstanding the government's repeated characterization of the district court's order as designed to relieve the burden imposed on respondent by the subpoena duces tecum, a comparison of the subpoena and the order show that the district court imposed affirmative obligations not demanded by the subpoena. If the authorization given by Section 1292(a)(1) of the Judicial Code for appellate review of injunctions is to have any meaning at all, it should at least be available to test the validity of an order requiring an individual to travel more than 20,000 miles[10] (at his own expense), obtain 2,000 pounds of documents from a foreign country, make application abroad to an official of that country, and then oversee that access to the documents

[10] The flying distance from Los Angeles to Nairobi (one way) is 10,088 statute miles. Via Pan American Airways, nearly twenty-five almost-continuous flying hours are required, with not less than six intermediate stops. (Los Angeles to New York [2,451 miles]; New York to Dakar [3,487 miles]; Dakar to Monrovia [755 miles]; Monrovia to Accra [722 miles]; Accra to Lagos [254 miles]; Lagos to Entebbe [2,088 miles]; Entebbe to Nairobi [331 miles].)

is given not only to authorized personnel of the grand jury but also to Treasury Department officials. Indeed, if no immediate review of such an order is available, the witness who is subject to it is—like the petitioner in *Perlman*—"powerless to avert the mischief of the order." 247 U.S. at 13.

2. The record in this case demonstrates tellingly how a witness may be unfairly and unconstitutionally pinioned by such an order if it is held unappealable. For the district judge considered his initial decision—which resulted in the July 25 order—as concluding the question of custody and control of the sought records. Consequently, the only factual issue on which he permitted a defense in the contempt stage of this action was whether there had been compliance with the July 25 order. Accordingly, respondent was in imminent danger of imprisonment if he failed to do any of the things enumerated in the order. This view of the district judge demonstrates persuasively that his order—now said by the government to be nonappealable—in fact went substantially beyond the initial subpoena duces tecum and sought to foreclose issues which the respondent was entitled to raise in the contempt action if no more than a motion to quash had been involved.

3. The policies underlying the *Alexander* and *Cobbledick* decisions are inapplicable here because the documents sought by the grand jury were permanently located abroad and were voluminous in quantity. By the very nature of the sweeping demand made by the subpoena duces tecum and the later order of the district court, there had to be extensive interruption in the grand jury proceedings before the documents could be made available to it. In these circumstances—particularly where an individual, rather than a corporation, is

subject to the subpoena and the order and he must personally make arrangements for the transportation of voluminous documents—prompt appellate review of the validity of the order is necessary and desirable, and it does not, in any significant respect, interfere with proper judicial administration.

We do not believe that any issue other than the appealability of the order of July 25 has been preserved by petitioner for review by this Court. Accordingly, if the threshold question is resolved by an affirmance of the court of appeals, that court's decision on the merits is conclusive. If, however, this Court deems it appropriate, notwithstanding the failure to preserve the issue, to consider the merits of the challenges to the order, we believe the result reached by the court of appeals is amply supported by this Court's decisions invalidating vague, overbroad and oppressive demands for documents. There are, in addition, many other grounds—which the court of appeals characterized as "persuasive"—for vacating the order and relieving the respondent of any obligation to comply with its terms.

ARGUMENT

The Court of Appeals carefully evaluated and analyzed the challenged order in this case. Having approximately six months previously dismissed, on the authority of *Cobbledick*, an appeal from an order denying a motion to quash grand jury subpoenas (*Lampman* v. *United States District Court*, 418 F.2d 215 (1969), certiorari denied, 397 U.S. 919 (1970)), the Ninth Circuit nonetheless held the order in this case appealable on the ground that the district court had done "more than deny a motion to quash" (A. 72). Because the order had " directed [Mr. Ryan] to under-

take steps in a foreign country to have * * * documents released by other persons for transportation to this country or for inspection in Kenya by United States agents" (A. 72), the court of appeals determined that the order was closer to a mandatory injunction than to the run-of-the-mill denial of a motion to quash.

In the first portion of this Argument we enumerate the many indicia of this order which demonstrate that it is, in fact, an injunction and not the kind of order contemplated by this Court's decisions in *Alexander* and *Cobbledick, supra.* Our second argument points out, in addition, how far removed even the subpoena here—considering its "breadth, reach, or overseas effect" (factors cited by the court of appeals, A. 72, n. 1)—is from the subpoena which formed the basis of the lower court's orders in *Alexander* and *Cobbledick.* We argue, in other words, that even if the district court had done no more than refuse to quash the sweeping subpoena served on Mr. Ryan, that order would—because of the type of subpoena involved—have been appealable under the various lower-court decisions which have recognized exceptions to *Alexander* and *Cobbledick* for situations in which their policies do not apply.

I.

THE DISTRICT COURT'S ORDER WAS A MANDATORY INJUNCTION WHICH WENT BEYOND ENFORCEMENT OF A GRAND JURY SUBPOENA.

The order entered by the district court appears at pages 63-64 of the Printed Appendix in this Court, and it is plain from even a most superficial examination of it that it goes well beyond the orders involved in *Alexander* and *Cobbledick.* Indeed, only the first two recital paragraphs of the order and its operative first

paragraph would come within the *Alexander-Cobbledick* formula; the remainder constitute nothing less than a mandatory injunction accompanied by a factual finding that forecloses a critical issue which the respondent would ordinarily be entitled to litigate in a plenary proceeding.

Moreover, it appears from the colloquy we have quoted in our Statement (pp. 13-14, *supra*) that even the district judge viewed his order as independent from the subpoena and did not see his action as a bare denial of a motion to quash. It was the district judge who observed, while Mr. Ryan's civil contempt proceeding was pending, that he was "under specific orders of the Court—not to comply with the subpoena, but to do certain things, and that was the order of the Court." (Appendix D, pp. 24a-25a, *infra.*) The court which had issued the order that the government now seeks to characterize as nothing more than the enforcement of a subpoena, stated at the time that "the subpoena duces tecum was used by the Court only in terms of reference to certain documents" and that the court's order "supplanted the subpoena duces tecum" (*ibid.*)

We turn first to paragraph III of the order, which most clearly goes beyond the acceptable scope of the denial of a motion to quash. We then demonstrate that paragraph II, in light of the factual recitation in the third paragraph of the order, was viewed by the district judge as forever foreclosing the critical factual issue in determining whether Mr. Ryan was legally obliged to comply.

A. Paragraph III of the Order Contained No Less Than Five Affirmative Directives and Authorizations Which Went Beyond the Denial of a Motion To Quash.

One of the arguments in the respondent's motion to quash the subpoena was that compliance with regard to many of the documents would violate foreign law. The district court did not, however, direct the party seeking the information—*i.e.*, the United States—to take the steps needed under foreign law to obtain the requested papers. That course—which had been approved in *Application of Chase Manhattan Bank*, 192 F. Supp. 817 (S.D.N.Y. 1961)—was forcefully urged upon the district court several times by respondent's counsel in the course of the hearings on this matter (see A. 45-46, 53-54). Instead, the district judge seized on the opportunity given him by Mr. Ryan's personal presence to add paragraph III to the order and impose the following personal obligations upon him with respect to the records subject to Kenya law:

1. To apply for release of the records to the Registrar of Companies in Kenya;

2. To make the application "forthwith";

3. To make arrangements for the availability of the records (if release is denied) to government agents in Kenya;

4. To make the records available in Kenya not merely to attorneys who are agents of the grand jury, but also to Treasury Department personnel; and

5. To make the records available on an open-ended basis—*i.e.*, not limited to use by the grand jury and subject to the secrecy cloak of Rule 6(e) of the Federal Rules of Criminal Procedure, but for any use the government agents might wish to make of it.

Notwithstanding the government's repeated efforts disingenuously to characterize this portion of the order as a boon to Mr. Ryan,[11] it is patent that it actually imposed substantial additional obligations and hardships on him under pain of contempt sanctions. In the first place, it is clear "that a person cannot be compelled to produce, under a subpoena, a document which is neither in his possession nor under his control." *Traub* v. *United States,* 232 F.2d 43, 47, n. 9 (D.C. Cir. 1955), quoting from *In re Rivera,* 79 F. Supp. 510, 511 (S.D. N.Y. 1948). The most authoritative statement of the rule appeared in this Court's opinion in *United States* v. *Bryan,* 339 U.S. 323, 330-331 (1950) (citations omitted):

> Ordinarily, one charged with contempt of court for failure to comply with a court order makes a

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[11] The first argument heading in the government's brief asserts that the order was "not made appealable by its provisions easing the burden of compliance." (Brief, p. 9). Other references along the same vein are the following:

> ". . . because the district judge [modified] the subpoena . . . in an obvious effort to take account of Respondent's objections and *make compliance less burdensome . . .*" (p. 10)
>
> ". . . the district court in this case *tempered its refusal to quash* . . . with terms *designed to make compliance by Respondent less burdensome.*" (p. 15)
>
> ". . . the subpoena's categorical directive to produce was replaced by the court's *directive to do the best that the circumstances allowed.*" (p. 15)
>
> ". . . the prescribed procedure—obviously aimed at taking account of objections raised by Respondent at the hearing on the motion to quash and *to afford him leeway in achieving compliance* before the return date . . . ." (p. 18)
>
> "Why should it be any different because the *court sought to provide flexibility . . . .*" (p. 20)
>
> ". . . *any ameliorative or clarifying directive,* . . . will render the entire subpoena appealable." (p. 20)

> complete defense by proving that he is unable to comply. A court will not imprison a witness for failure to produce documents which he does not have unless he is responsible for their unavailability or is impeding justice by not explaining what happened to them.

The impossibility of complying with the subpoena as to a large portion of the requested records without violating Kenya law would plainly have been a "complete defense" for Mr. Ryan if there had been no other provision in the district court's order than the denial of the motion to quash.[12] In adding paragraph III, therefore, the district court was hardly being "ameliorative" or seeking to "make compliance less burdensome." It was, rather, *adding* obligations to those imposed by the subpoena in order to head off the defense that bringing the records back would violate Kenya law.

Nor can the government truthfully claim that the portion of paragraph III requiring that the records be made available in Kenya to government agents was "ameliorative" or "eased the burden of compliance." If, as was in fact true, permission could not be obtained from the Registrar of Companies for removal from Kenya of the books of accounts, minute books and lists of members, the *only* way for the government to obtain access through Mr. Ryan (if, as the government contends, he had some control over the documents) was to direct him to make arrangements in Kenya. Simply

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[12] It is well-established that a court should not order any party to act in violation of foreign law. See, *e.g.*, *First National City Bank* v. *Internal Revenue Service*, 271 F.2d 616, 619 (2d Cir. 1959); *Application of Chase Manhattan Bank*, 192 F. Supp. 817, 819 (S.D.N.Y. 1961).

ordering him, as the subpoena duces tecum did, to bring the embargoed documents to the United States could not have done the job. Hence rather than "easing the burden of compliance," the challenged order had the effect of using him personally as the government's agent to take measures which the government should have done on its own.

The decisions of this Court and lower federal courts bearing on the definition of mandatory injunctions for purposes of appealability under 28 U.S.C. § 1292(a)(1) demonstrate that paragraph III unquestionably qualifies the ruling of July 25 as such an order. In *Red Star Laboratories Co.* v. *Pabst,* 100 F.2d 1 (7th Cir. 1938), for example, an interlocutory order to certain insurance companies relating to the beneficiaries of life insurance policies was held to be an appealable mandatory injunction because the companies were directed to "remove forthwith" certain named beneficiaries. Observing that the order was "a command unequivocal in its terms," the court found it immediately appealable as an interlocutory mandatory injunction. The same conclusion was reached in *United States* v. *Kovich,* 201 F.2d 470 (7th Cir. 1953). And in *International Longshoremen's Ass'n* v. *Philadelphia Marine Trade Ass'n,* 389 U.S. 64, 75 (1967), this Court, in construing the word "injunction" as used in Rule 65(d) of the Federal Rules of Civil Procedure, defined it as "an equitable decree compelling obedience under the threat of contempt" and included within that definition orders directing affirmative action—in other words, mandatory injunctions.

The government apparently does not deny that paragraph III of the order has all the earmarks of a manda-

tory injunction. Its only argument is that the obligations imposed are "inherent" in any subpoena duces tecum (Brief, p. 16). But there is plainly no similarity between the purely ministerial acts which may be required of any grand jury witness and which the government hypothesizes in its brief and the very substantial and substantive burdens imposed by the order in this case.

The government contends, for example, that the application to the Registrar of Companies in Kenya is no different from the obligation which might be imposed on a witness to remove documents from a bank vault (Brief, pp. 16-17). The analogy is patently flawed because in the government's hypothetical neither the bank nor any other governmental agency has an interest in preventing removal of the documents; hence the removal and transportation is purely ministerial. What if, however, the documents had been impounded and were in the custody of a State court? Could a witness under a subpoena duces tecum be compelled to institute judicial proceedings to obtain their release so he could bring them to a federal grand jury?[13] (Or would the government be obliged to make that application through its own agents and in its own name?)

Moreover, in the government's hypothetical bank-vault situation, a court might well—with the consent of the witness—authorize examination of documents by agents of the grand jury in a remote location where it is clear that the documents *would ultimately be pro-*

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[13] The government says cavalierly that if a subpoenaed witness' documents "are in the custody of another, he must ask that person to surrender them." (Brief, p. 16) If the other person has an adverse claim to the papers, must the witness initiate a lawsuit?

ducible before the grand jury. It does not follow, however, that if the bank has valid and enforceable legal grounds for preventing removal of the documents (as the Registrar of Companies apparently has here), the witness may be compelled by a subpoena duces tecum to make arrangements with the bank for examination of the documents by government agents in the bank's offices. Yet that is precisely what paragraph III of the challenged order does—under the guise of enforcing a subpoena duces tecum.

If Mr. Ryan did not make the requested application—for which was required to travel 20,000 miles at his own expense—he was in danger of imprisonment or fine for contempt. Indeed, under the terms of the order, he was required to lay aside any personal or other plans and make the request "forthwith"—again under pain of contempt sanctions. And if the request was turned down, he would still be liable for contempt penalties if he did not make arrangements abroad for government agents to see what he could not lawfully bring back with him. These are hardly the common incidents of a grand jury subpoena duces tecum. See our discussion of the early common-law cases at pp. 34-35, 39-41, *infra.*

The clearest indication, however, of how much further paragraph III goes than a simple denial of a motion to quash a grand jury subpoena are the conditions it prescribed for the examination in Kenya. Under the terms of paragraph III, access to the records was to be given in Kenya not merely to the grand jury and to "attorneys for the government" within the meaning and policy of Rule 6(e) of the Federal Rules of Criminal Procedure, but also to "agents of * * * the United

States Department of the Treasury" (A. 64). In addition to corroborating one of the contentions made in the motion to quash (*i.e.*, that the grand jury subpoena was being abused in that it was used as a substitute for the unsuccessful Internal Revenue Service summonses), the incorporation of this provision put the order far beyond the underlying grand jury subpoena. For if, as the government contends, the examination in Kenya was designed "to do the best that the circumstances allowed" (Brief, p. 15), it is surprising that the government was to be allowed greater freedom in the persons who would be permitted to see the documents produced than if they had been brought before the grand jury. For in the latter event, even *attorneys* for other federal agencies could not have had access to the documents (*In re Grand Jury Proceedings*, 309 F.2d 440 (3d Cir. 1962); *United States* v. *General Electric Co.*, 209 F. Supp. 197 (E.D. Pa. 1962)), much less non-attorney agents of the Internal Revenue Service.

The additional fact that the use to which the examination in Kenya could be put was not limited in any way buttresses our argument that there is substantially more to the court's order than enforcement of a grand jury subpoena. Mr. Ryan was under an order—enforceable by contempt—to make records available in Kenya without the slightest safeguard that they would not be used in a thoroughly impermissible way to initiate or sustain civil tax assessments. In similar circumstances involving allegations of abuse of grand jury process to obtain information for treasury agents interested in civil proceedings, the Court of Appeals for the Seventh Circuit directed that "the protective power of the district court" be used "in such detail and di-

rected to such persons as to make it capable of effective enforcement" to prevent such abuse. *In re April 1956 Term Grand Jury,* 239 F.2d 263, 272 (7th Cir. 1956).

B. The Direction in Paragraph II of the Order Based on the Finding That Respondent Had Control of the Records Makes It an Appealable Injunction.

Another aspect of the challenged order which removes it from the class of denials of motions to quash held nonappealable under *Alexander* and *Cobbledick* is the finding made by the district judge that Mr. Ryan had control of the Kenya records and the resulting directive of paragraph II that he bring back to the United States those records not affected by Kenya law. In subsequent proceedings, the government argued, with the apparent agreement of the district judge, that this finding was analogous to the finding of possession and control in bankruptcy turnover orders and that, as was held in *Maggio* v. *Zeitz,* 333 U.S. 56 (1948), the determination of custody and control could not be relitigated in a contempt proceeding arising out of the court's order. (See Appendix D, p. 21a, *infra.*) It follows, we submit, that the order directing respondent to produce the documents is, like the bankruptcy turnover order, immediately appealable, and that its legal validity and evidentiary basis may be challenged in a court of appeals.

The issue in *Maggio* v. *Zeitz, supra,* was whether an individual who had been found by a bankruptcy court to have withheld and concealed assets which he still possessed and who had been ordered to turn over those assets to the trustee in bankruptcy could litigate the question of his possession of the assets in a contempt proceeding instituted when he failed to comply with

the turnover order. This Court, reaffirming the rule of *Oriel* v. *Russell*, 278 U.S. 358 (1929), held that (333 U.S. at 69-70; emphasis added):

> It would be a disservice to the law if we were to depart from the longstanding rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. * * * Every precaution should be taken that orders issue, *in turnover as in other proceedings,* only after legal grounds are shown and only when it appears that obedience is within the power of the party being coerced by the order. * * * We therefore think the Court of Appeals was right insofar as it concluded that the turnover order is *subject only to direct attack,* and that its alleged infirmities cannot be relitigated or corrected in a subsequent contempt proceeding.

In the present case, respondent raised the matter of his lack of control or custody over the requested documents at the earliest possible time—*i.e.,* in his motion to quash. This timing followed the suggestion made by this Court in *McPhaul* v. *United States,* 364 U.S. 372, 378-379 (1960), and *United States* v. *Bryan,* 339 U.S. 323, 332-333 (1950), where the Court disapproved of the withholding of a witness' claim that documents could not be produced until his trial for contempt. Indeed, respondent's counsel even suggested to the government and the court, along the lines of the *McPhaul* decision, how the government might take "other appropriate steps to obtain the records." 364 U.S. at 379. It would, in these circumstances, be a perversion of justice to hold that by properly raising the matter at a time when other steps could be taken by the government, the respondent was deprived of any appel-

late review of his claim that he does not have control over the documents.[14]

The district judge in this case could, of course, have followed his initial instincts with regard to the question of custody and control and have left that issue for presentation by Mr. Ryan when he appeared before the grand jury (A. 48). Instead of following that course, he decided to hold an evidentiary hearing (at which only affidavits and documents were presented), and he made a deliberate finding that Mr. Ryan had had control over the Kenya documents enumerated in the subpoena "before and after commencement of the investigation by the Treasury Department and Department of Justice" (A. 63). On the basis of this finding, he did not merely deny the motion to quash, but affirmatively ordered Mr. Ryan

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[14] There is, in fact, a great evidentiary gap in the record with respect to control over the records in March 1968, and the government's total proof—on the basis of which the district judge made his finding—can be summarized as follows:

(1) An annual report of Mawingo, Ltd., dated January 3, 1968, showing that Mr. Ryan was not a director and that Ryan Investments, Ltd. was the record owner of 3600 of the 4500 shares of Mawingo, Ltd. (Gov. Exh. 1; R. Vol. III, p. 116).

(2) An annual report of Ryan Investments, Ltd., dated December 29, 1967, showing that Mr. Ryan was not a director and that a Ray Ryan owned 98 of the 100 shares of Ryan Investments, Ltd. (Gov. Exh. 2; R. Vol. III, p. 117).

(3) Affidavits supplied by Mr. Ryan to the Internal Revenue Service in 1966 and 1967 stating that he held stock of Ryan Investments, Ltd. as a nominee and giving Internal Revenue Service permission to use the nominee agreement. (pp. 1a-5a, *infra*).

(4) The grand jury testimony of William Holden which was specific only on the point that one Mills was the custodian of the records of the companies and that one Carl Hirschman "was in charge of the business." (Gov. Exh. 4; R. Vol. III, pp. 142-143). See note 3, *supra*.

to bring to the United States the records other than the "books of account, minute books, and list of members." That order was analogous to a bankruptcy turnover order and was, therefore, appealable.

C. In Combination, the Finding of Control and Paragraphs II and III of the Order Exceeded the Proper Scope of Judicial Enforcement of a Subpoena.

The government's basic argument is that the district court's order of July 25 was merely a "modification" of the subpoena and that such "modification" does not render the order appealable. The government contends that "auxiliary orders" by district judges "to make the subpoena more precise, thereby clarifying or perhaps narrowing the witness' duty" should be encouraged "if for no other reason than to protect a witness from overbroad or oppressive subpoenas." Brief, p. 20.

We do not quarrel with this proposition—except to the extent that it purports to describe this case. Of course, district courts may narrow overbroad subpoenas duces tecum or strike certain specifications if the documents sought should not be produced. And we do not maintain that such action renders the district court's decision appealable. But when—as is true here—the court orders a witness to take action which will make *otherwise unavailable* documents accessible to the government and when it makes conclusive findings on issues of custody and control, it has gone beyond the proper scope of enforcement of a subpoena.

If a court were satisfied, for example, that a subpoenaed witness did not have custody or control over certain documents, but that a close friend of his—with

whom he was influential—did have such custody and control, could the court "modify" a subpoena duces tecum to order the witness to request the documents from the friend or to persuade the friend to make them available? Plainly that would not be a proper "modification," and such an order could be promptly appealed as a mandatory injunction.

It is, of course, true that a witness who is served with a subpoena duces tecum must take "affirmative action" to comply. But we have found no case—and the government has cited none—in which it has been held to be a proper part of the enforcement of the subpoena to direct the witness *how* he is to comply. The subpoena is designed to secure the attendance of the witness and the presence of the documents at a designated time before a designated tribunal;[15] it is not a proper means for coercing individuals to engage in acts, either here or abroad, to make documents accessible for inspection.

Mr. Justice Frankfurter, who was the author of the *Cobbledick* opinion, also joined the dissenting opinion of Mr. Justice Black in *United States* v. *Fleischman*, 339 U.S. 349 (1950), wherein Lord Ellenborough's historic ruling in *Amey* v. *Long*, 9 East 473, 483 (K.B. 1808), regarding the proper reach of a subpoena duces tecum was quoted. Speaking in that case of a situation in which a document sought by a subpoena duces tecum was "in the possession of another, and on that account attainable only through the means or by the

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[15] The government suggests that "auxiliary orders" may be needed to avoid "footdragging." Brief, p. 17. Since a subpoena specifies the date for compliance it hardly seems necessary to have "auxiliary orders" for that purpose.

delivery of such other person," Lord Ellenborough held that it could not be reached by subpoena—"no man being obliged, according to any sense of the effect of such a subpoena, to sue and labor in order to obtain the possession of any instrument from another for the purpose of its production afterwards by himself, in obedience to the subpoena." See also *Munroe* v. *United States,* 216 Fed. 107 (1st Cir. 1914). In reliance on this classic holding, Justices Black and Frankfurter observed (without disagreement over this particular proposition by the majority): "A command to produce is not a command to get others to produce or assist in producing." 339 U.S. at 366.

The plain fact of the matter is that the government is, in this case, using the personal jurisdiction it has obtained over Mr. Ryan to order him to do things which may make certain voluminous records permanently located in Kenya available for government inspection. There is no lack of proper legal procedures for obtaining access to such records. Under 28 U.S.C. § 1783 (a), an American citizen in a foreign country may be subpoenaed and required to produce "a specified document or other thing," and this is the procedure usually used when documents located abroad are sought. On such an application, however, the party requesting production of the document must establish that the production of the "specified document" which is sought "is necessary in the interest of justice," and, "in other than a criminal action or proceeding," the requesting party must also satisfy the court that it cannot "obtain the production of the document or other thing in any other manner." Construing this very statute in light of its history, the Court of Appeals for the Second Circuit concluded in *United States* v. *Thompson,* 319

F.2d 665 (2d Cir. 1963), that "criminal proceeding" does not include a grand jury investigation.[16] Consequently, if Mr. Ryan had custody of these documents and if the government could show that the production of the 2000 pounds of records was "necessary and in the interest of justice" and could not be obtained "in any other manner," it could serve such a subpoena. The clear inference is that it has chosen the easier route because it is unable to meet the statutory standards.

Moreover, the custodians of the records in Kenya are known; their affidavits have been filed with the district court. There is nothing preventing the government from seeking letters rogatory under which inspection of the enumerated records could be secured by service of Kenya process on the custodians residing in Kenya. The government has chosen instead to use Mr. Ryan as its instrumentality to make the records available, and the result of its efforts should not be immune from appellate review prior to the great expenditure of expense and effort which the district court's order requires.

The facts of this case demonstrate the overreaching of which the government is capable. Requiring an individual to be responsible for the safe transportation of 2000 pounds of records half-way around the world is an incredible burden. Equally incredible is that this is required to be done at Mr. Ryan's own expense, there being no advance of funds to defray the cost. If he were an indigent businessman, such an order

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[16] The amendment of 28 U.S.C. § 1783 subsequent to the *Thompson* decision made it possible to subpoena a witness from abroad in other than a "criminal proceeding." It did not, however, alter the definition of that term.

would be unthinkable. Because he has some financial means, the prosecution and district court appeared willing to apply a different standard. We submit that an order which has the effect of this one should be reviewable immediately.

In light of the many provisions of this particular order and the possible penalties to which Mr. Ryan was subject if he failed to abide by it, this is not a situation in which to apply the "historic rule" (as Circuit Judge Friendly put it in *United States* v. *Fried,* 386 F.2d 691, 695 (2d Cir. 1967)) "putting a witness' sincerity to the test of having to risk a contempt citation as a condition to appeal." More is involved here than the witness' "sincerity" since the order might be deemed violated by any of many courses that Mr. Ryan could have taken. In fact, the district judge was ready—as the subsequent proceedings show —to hold Ryan in contempt unless he could show that some circumstances arising *after* the entry of the order made compliance impossible. This ruling placed Mr. Ryan in the same position as the complaining party in *Perlman* v. *United States,* 247 U.S. 7 (1918), where an appeal from an interlocutory order affecting custody of documents was allowed because otherwise the complainant would have been "powerless to avert the mischief of the order, but [would have had to] accept its incidence and seek a remedy at some other time and in some other way." 247 U.S. at 12. If, on the present state of the record, no appeal were allowed in this case from the order of July 25, Mr. Ryan will have been placed in the position of having been powerless to "avert the mischief" of the directive that he travel to Kenya and take the specified actions abroad.

II.

A COURT ORDER ENFORCING A SUBPOENA DUCES TECUM REQUIRING THE PRODUCTION BY AN INDIVIDUAL OF VOLUMINOUS RECORDS PERMANENTLY KEPT ABROAD IS APPEALABLE UNDER ALEXANDER AND COBBLEDICK.

Our initial argument has demonstrated that the district judge did more in this case than merely enforce a subpoena duces tecum, and we contend that the excess portions of his order render the entire decree appealable. We now argue, in addition, that considering the nature of the particular subpoena at issue here, his order would have been appealable even if it had contained no more than the first operative paragraph —*i.e.*, if it had merely refused to quash the subpoena.

We begin with the policies underlying the *Alexander* and *Cobbledick* decisions. In both cases, this Court emphasized the interruption and delay which would ensue if appeals were permitted during a trial or in the course of a grand jury proceeding whenever a witness was subpoenaed and the court overruled his motion to quash the subpoena. The Court recognized in both cases that there was a legitimate interest on the part of the witness in having the validity of the trial court's decision tested on appeal. But it concluded that such review must await the witness' refusal to testify and the citation for contempt. Essentially, what the Court was saying was that the "witness' sincerity [would be put] to the test of having to risk a contempt citation as a condition to appeal." *United States* v. *Fried*, 386 F.2d 691, 695 (2d Cir. 1967).

But this limitation upon the right to obtain appellate review was justified in *Alexander* because the Court was concerned over "unduly impeding the progress of the case" (201 U.S. at 121), and in *Cobbledick*

because an appeal might result in "undue interruption [of] the inquiry instituted by a grand jury" (309 U.S. at 327). Since the subpoena in this case is one which, by its own operation, results in substantial "interruption" and "impedes the progress" of the ongoing proceeding, there is no policy reason here to bar an appeal.

A subpoena duces tecum served on an individual in the United States directing him to bring before a grand jury "all books, records, papers and documents * * * pertaining to" five companies located in Nairobi and Nanyuki, Kenya (A. 11-12) can obviously not be complied with immediately. See note 10, *supra.* Indeed, the government's own recognition of the delay inherent in such mass production of foreign records is demonstrated by the fact that it initially agreed to continue Mr. Ryan's appearance from August 16, 1967, until some distant future date, and that it did not again request his appearance until February 1968—almost five months after the grand jury sitting in August 1967 had been discharged.

On the other side of the balance is the very substantial burden such a subpoena—if it is lawful at all—imposes on a witness. If he is to comply, he must travel abroad, gather together the voluminous papers, and bring them back to the United States. In *Munroe v. United States,* 216 Fed. 107 (1st Cir. 1914), the question was whether a partner of a banking and foreign exchange firm whose principal place of business was Paris, France, could be compelled by a subpoena duces tecum to produce certain paid checks drawn on his firm by a person under grand jury investigation. The partner totally disregarded the subpoena and made no request that the checks be for-

warded from Paris. On reviewing his conviction for contempt, the court of appeals held (216 Fed. at 112):

> . . . He could not lawfully be called upon under a writ of subpoena duces tecum, to sue and labor to the extent of superintending shipment of papers from France to the United States, to have the care and responsibility of them upon arrival, or of being obliged to await the necessities of Atlantic navigation, and to assume all the other incidents of an importation of this character, including the chance of the time of the arrival of the documents and the travel to and from in connection therewith, merely for the per diem of a witness of perhaps only one day attending court, and the mileage from his place of residence to the place of trial.
>
> We make these observations because the amount of responsibility and attention required from the position of the United States, with reference to importing documents from a foreign country, are too great to be lawfully demanded as the result of a subpoena duces tecum upon an ordinary witness; and in doing this we stop short of considering whether, in any event, the service of a subpoena can compel a witness to go outside of the district of his own residence for the purpose of obtaining documents, or for any purpose except traveling to the place of judicial session for which he is compensated, and especially whether a subpoena duces tecum can compel the holder of documents, which, in many cases, may be of very great value, to transport them from one foreign country to a domestic country, and especially across the high seas, with all the perils attaching thereto. No case can be found which justifies a proposition of that character.

To be sure, a subpoena duces tecum may, in certain circumstances, require corporations to produce records which are, at least temporarily, located abroad. The

seminal decision in that regard—relied on by the court of appeals in *Securities and Exchange Commission* v. *Minas de Artemisa,* 150 F.2d 215, 217 (9th Cir. 1945) —is *Consolidated Rendering Co.* v. *Vermont,* 207 U.S. 541 (1908). In that case, however, this Court was careful to point out that the order was issued to "a corporation doing business in the state, and protected by its power, * * * to produce, before a tribunal of the state, material evidence in the shape of books or papers *kept by it in the state,* and which are in its custody and control, *although, for the moment, outside the borders of the state.*" 207 U.S. at 552. (Emphasis added.) The *Consolidated Rendering* case did not involve, in other words, records permanently kept in a foreign jurisdiction.[17]

There is, in fact, substantial doubt whether a subpoena duces tecum can compel the kind of production sought here. In the *Munroe* case, heavy reliance was placed on Lord Ellenborough's ruling in *Amey* v. *Long,* 9 East 473 (K.B. 1808), wherein the then Chief Justice of England held, in essence, that a subpoena duces tecum could only compel a witness to bring with him such items as he then had in his possession. If, as Lord Ellenborough's rule provides, he may not be compelled to "sue and labor" for the items requested in the subpoena, the obligations imposed in this case are, *a fortiori,* beyond the power of a subpoena.

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[17] We recognize that there have been instances in which corporations or banks with foreign branches have been directed to produce records kept abroad. (*E.g., In re Equitable Plan Co.,* 185 F.Supp. 57 (S.D.N.Y. 1960); *In re Grand Jury Subpoenas Duces Tecum,* 72 F. Supp. 1013 (S.D.N.Y. 1947); *In re Harris,* 27 F.Supp. 480 (S.D.N.Y. 1939)). But none of those cases has involved a subpoena served on an individual or a volume of records as large as that in this case.

There have been various factual contexts in which, notwithstanding *Alexander* and *Cobbledick*, lower federal courts have permitted appeals from denials of motions to quash subpoenas. The reasoning behind those decisions—in which the policies of *Alexander* and *Cobbledick* were held inapplicable—applies to this case.

In *First National City Bank* v. *Aristeguiéta*, 287 F.2d 219 (2d Cir. 1960), three banks served with subpoenas duces tecum in extradition proceedings were permitted to take appeals from denials of motions to quash. The same response as the government has given to Mr. Ryan in this case was available there—the banks' representatives could have tested the validity of the subpoenas by refusing to produce the documents and defending against contempt proceedings. Yet both the Second and Fifth Circuits held the district court orders to be final and appealable. 274 F.2d 206, 287 F.2d 219.

Similarly, in *In re Letters Rogatory*, 385 F.2d 1017 (2d Cir. 1967), an appeal was allowed from an order directing two banks to produce documents pursuant to a request under letters rogatory from the Government of India. There, again, each bank official could —as the court observed—have "obtain[ed] review by allowing himself to be cited for contempt" (385 F.2d at 1018), but the banks were permitted to test the validity of the order in the court of appeals without going through that procedure.

In both *Schwimmer* v. *United States*, 232 F.2d 855 (8th Cir. 1956), and *United States* v. *Guterma*, 272 F.2d 344 (2d Cir. 1959), courts of appeals considered appeals from denials of motions to quash filed by the

"targets" of grand jury investigations with respect to subpoenas served on third parties who were custodians of their records. In the *Schwimmer* case, the court of appeals stated its reasons for considering the appeal in broad terms applicable here (232 F.2d at 860):

> Refusal of the District Court to quash, as an unreasonable search and seizure, a subpoena duces tecum issued in a grand jury investigation is a final or appealable order. [Citing *Perlman.*]

There have, in addition, been other circumstances in which orders appearing to fall with the *Alexander-Cobbledick* principle have been held appealable. See, *e.g., In re Wingreen Co.,* 412 F.2d 1048 (5th Cir. 1969); *Saunders* v. *Great Western Sugar Co.,* 396 F.2d 794 (10th Cir. 1968); *Covey Oil Co.* v. *Continental Oil Co.,* 340 F.2d 993 (10th Cir. 1965); *McDonnell* v. *Birrell,* 321 F.2d 946 (2d Cir. 1963); *Mosseller* v. *United States,* 158 F.2d 380 (2d Cir. 1946); cf. *Continental Oil Co.* v. *United States,* 330 F.2d 347 (9th Cir. 1964) (either appeal or mandamus).

The lesson of these decisions, we submit, is that the *Alexander* and *Cobbledick* rule is, as the *Cobbledick* decision itself indicated, not inflexible. Where the harm produced by requiring the witness to await a contempt action is considerable and there is little benefit in denying immediate appellate review, an appeal should be permitted.

That is plainly the case with this subpoena. Unlike the ordinary witness who may refuse today to produce some or all of the documents requested by a subpoena and who can, if he is subject to civil contempt, return tomorrow with the records which a court of appeals

orders him to produce, the witness here must examine voluminous documents located abroad, decide which, if any, should be brought back halfway across the world, and litigate with the prospect that, in light of the passage of time, he will be subjected to criminal contempt sanctions rather than civil contempt.[18] A subpoena as sweeping as this one, requiring many weeks or months of effort to achieve compliance and affecting the transportation of voluminous records located overseas, is as severable from the total grand jury investigation as the subpoenas in the extradition and letters rogatory cases.

In this very case, the order of July 25 set the date for compliance as September 11—a month-and-a-half away. Appellate courts have often been called upon to pass expeditiously on orders which are to take effect less than six weeks from the date of entry. The many public school desegregation cases heard in the past few years by this Court and courts of appeals have presented questions which had to be resolved against close time limits, and the same has often been true of reapportionment and voting-rights cases. The need for quick decision has never been thought to justify denial of appellate review, and it should not do so in these circumstances.

There is, finally, no substance whatever to the government's totally unsupported assertion that "if the order at issue here is found to be appealable, it can

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[18] Compare, however, *Shillitani* v. *United States*, 384 U.S. 364, 372, n. 9 (1966), where this Court observed that a district judge must "consider the feasibility of coercing testimony through the imposition of civil contempt * * * [and may] resort to criminal sanctions only after he determine, for good reason, that the civil remedy would be inappropriate."

be predicted with fair assurance that stays will regularly be sought and often obtained." Brief, p. 24. In our Brief in Opposition to the Petition for Certiorari, we challenged the government to cite a *single* other instance of a district court order enforcing a grand jury subpoena by directing a witness to take steps in a remote foreign country to bring back voluminous records. Brief in Opposition, pp. 8-9. The government has yet to cite such a case.

In fact, we submit, the overwhelming weight of precedent—as far back as 1808—demonstrates that such an order has never been deemed to come within the proper definition of a subpoena duces tecum. Hence it would not interfere with lawful and orderly grand jury proceedings if this Court were to affirm the court of appeals' holding that the validity of such an order is reviewable under 28 U.S.C. § 1292(a)(1). Such a ruling would not affect most grand juries and would remit the government, if it wishes to obtain voluminous records from a remote foreign country by service of process upon a United States citizen, to the procedures of 28 U.S.C. § 1783 or to ordinary injunctions reviewable in a court of appeals.[19]

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[19] We demonstrate in our brief argument on the merits of the district court's order that it was patently impermissible and violative of decisions as far back as *Hale* v. *Henkel*, 201 U.S. 43 (1906). The court of appeals properly assumed jurisdiction of the appeal and vacated the order, and this Court should affirm its decision. But we note that even if appellate jurisdiction be lacking, the court below, in similar circumstances, vacated grand jury subpoenas by treating an appeal as an application under 28 U.S.C. § 1651. *Continental Oil Co.* v. *United States*, 330 F.2d 347 (1964). If our argument on appealability be rejected, therefore, the case should be remanded to the court of appeals for its consideration as to the applicability of the All Writs Act.

III.

THE DISTRICT COURT'S ORDER WAS INVALID FOR A VARIETY OF REASONS, INCLUDING ITS UNCONSTITUTIONAL OVERBREADTH AND OPPRESSIVENESS.

Respondent presented to the court of appeals a variety of constitutional and legal grounds for vacating the order of the district court, and the *per curiam* opinion of the court indicates that it found many of the arguments "persuasive" (A. 71). Since we believe that the government has not properly preserved in this Court its present challenge to the decision of the court below on the merits (see note 1, *supra*), we do not think it appropriate to burden this brief with our extended discussions of the various arguments made below.[20] We have, for convenience' sake, set out in the margin the argument headings in our brief before the court of appeals,[21] and we have lodged with the Clerk several copies of that brief.

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[20] In any event, if this Court were to disagree with the conclusion of the court below that "the Order is vague and overly broad" (A. 71), the case should be remanded to the court of appeals for its consideration of the other challenges to the order. *See, e.g., United States* v. *Beach*, 324 U.S. 193 (1945); *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960); *Chaunt* v. *United States*, 364 U.S. 350 (1960); *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967).

[21] I. Ryan Was Immune From Service or Process

A. A Witness Coming Into the United States To Attend a Judicial Proceeding Is Immune From Process

B. The Subpoena Was a Patent Attempt To Avoid the Requirements of 28 U.S.C.A. § 1783

C. Subpoena Cannot Compel the Action Commanded Here

D. Service in the Presence of the Court Was Improper

II. The Unlimited Scope of the Subpoena Violates the Fourth

With respect to the ground for vacating the order on which the court of appeals relied, we believe it to be amply supported by decisions of this Court and lower federal courts. No matter how narrowly the government now wishes to construe the order (Brief, pp. 28-30), it calls for the delivery to the United States (or production in Kenya) of *all* the "records, papers and documents" of two Kenya corporations—one which had been in existence "for less than seven years" and the other—incorporated in 1938—"covering a period of under ten years" (Brief, p. 30). This sweeping demand is plainly covered by the language of Mr. Justice Holmes for a unanimous Court in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298, 306 (1924):

> It is contrary to the first principles of justice to allow a search through all the respondent's rec-

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Amendment, Particularly Since the Documents Are 10,000 Miles Away.

III. The Subpoena and Court Order Require Petitioner To Violate the Laws of Kenya

IV. Petitioner Did Not Have Custody and Control; the Finding Was Not Supported by the Evidence

V. The Grand Jury Subpoena in Issue Is an Improper Attempt To Enforce an Internal Revenue Service Summons

VI. The Order of July 25 Is Not a Lawful Order

- A. The Order of July 25 Is Void for Non-Compliance With Federal Rule of Civil Procedure 65(d)
- B. The July 25 Order Never Became Effective Since It Was Never Entered as Required by Rule 79(a)
- C. The Order of July 25 Does Not Comply With 28 U.S.C.A. § 1691 and Is Void

VII. The July 25 Order Commanding Ryan To Comply With the Subpoena Violates His Fifth Amendment Rights Against Compulsory Self-Incrimination

VIII. Submission of Secret Documents to the Court Deprived Ryan of His Right to a Due Process Hearing

> ords, relevant or irrelevant, in the hope that something will turn up. * * * A general subpoena in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced.

The order in this case is squarely covered by the leading decision of this Court in *Hale* v. *Henkel,* 201 U.S. 43, 75-77 (1906), where a similar subpoena duces tecum was held to be as invalid "as a search warrant would be if couched in similar terms." It is totally inconceivable that a court would ever sustain a search warrant which called for the seizure of "all books, records, papers and documents of Ryan Investment, Ltd. of Nairobi, Kenya, and Mawingo, Ltd., of Nanyuki and Nairobi, Kenya, doing business as the Mount Kenya Safari Club." The fact that, in certain major antitrust investigations cited in the government's brief (p. 30), a greater weight of documents than 2,000 pounds was deemed relevant to the particular grand jury inquiries at issue is of no precedential value here. In each of those cases, the documents sought were specified with particularity, and their relevance to the inquiry was established to the satisfaction of the court.[22] In the present case, the order seeks literally every scrap of paper held by the two corporations in the ordinary course of their business. Nothing could conceivably be more of a general search.

Moreover, the government made absolutely no effort to establish to the court below how this wholesale de-

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[22] In *In re Eastman Kodak Co.,* 7 F.R.D. 760, 764 (W.D.N.Y. 1947), for example, the district judge noted that "[i]n this particular type of investigation it must be seen that a wider range of inquiry is necessary than in the general run of criminal cases. In this particular instance it is obvious that it normally would be necessary to examine many documents of the Company."

livery of Kenya documents was relevant to any inquiry being conducted by the grand jury. (Indeed, in its opposition to the Motion to Quash, the government flatly denied that the investigation concerned any "possible evasion of income tax." R. Vol. I, p. 61.) This contrasts with the affidavits and proof submitted by the government in support of substantially less burdensome subpoenas duces tecum (which were nonetheless quashed) in *Application of Certain Chinese Family Benevolent & District Associations,* 19 F.R.D. 97 (N.D. Cal. 1956). See also *In the Matter of the Grand Jury Subpoena Duces Tecum,* 203 F. Supp. 575 (S.D.N.Y. 1961). Nor is there the slightest hint in the government's brief in this Court as to how every last page of the Kenya corporations' records related to the grand jury investigation. Apparently the government stands entirely on its right to demand *all* records, without any showing of relevance, need or particularity. That position flies so squarely in the face of more than a century of constitutional protections afforded by this Court's decisions that it is startling to see it suggested by the Solicitor General.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

HERBERT J. MILLER, JR.
RAYMOND G. LARROCA
NATHAN LEWIN
MILLER, CASSIDY, LARROCA & LEWIN
1320 19th Street, N. W.
Washington, D. C. 20036
Attorneys for Respondent

APPENDIX

APPENDIX

APPENDIX A

STATE OF INDIANA
VANDERBURGH COUNTY } ss:

BEFORE THE U.S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

INTERNAL REVENUE DISTRICT OF INDIANA

RE: TAX LIABILITY FOR THE CALENDAR YEARS 1957 THROUGH 1965, INCLUSIVE
OF
RAYMOND J. RYAN (A/K/A RAY RYAN) AND HELEN RYAN, 600 LOMBARD STREET, EVANSVILLE, INDIANA, OR, 218 COURT BUILDING, EVANSVILLE, INDIANA

Ray Ryan, being duly sworn upon oath, deposes and says that he is one and the same person as the Ray Ryan mentioned in the foregoing caption. That Glen Johnson, Special Agent of the U.S. Treasury Department, Internal Revenue Service, on the 18th day of November, 1966, at Evansville, Indiana, served a summons on affiant as Director of the following corporations: (1) Mount Kenya Safari Club Establishment, Liechtenstein; (2) Ryan Investments, Limited, Kenya, East Africa; (3) Mawingo Limited, Kenya, East Africa, requiring him to appear before Special Agent Glen Johnson, an officer of the Internal Revenue Service, to give testimony relating to the tax liability of the aforenamed corporations; that Attachments A, B and C required affiant to produce certain books, records and documents therein particularly set out and specified; that at the time of the service of said summons on affiant he was convalescing from an operation and was in ill health, which fact was well known to said Glen Johnson. That the books, records and documents that affiant is required by said summons to present to said Special Agent are not now, nor have they ever been in his custody or under his control and affiant has no knowledge as to whether any such books, documents or records exist, and that affiant's relation with any of the corporations

named in Attachments A, B and C of the summons was solely as that of a nominee and that he, at no time, knew the name or names of any of his principals other than the name disclosed to Special Agent Glen Johnson in confidence and by giving said Special Agent a copy of his agreement with the party therein named.

Affiant, at the time of the service of said summons, advised said Special Agent Glen Johnson that as soon as his health permitted he would make a trip to Europe and Africa in an attempt to comply with the requirements of said summons; that he has been unable to make such trip because of his ill health.

Affiant is of the opinion that he has now recovered his health sufficiently to make such trip and is contemplating going to Europe and Africa after the Christmas holidays of 1966; that he is required by the summons to appear at the Internal Revenue Office, Intelligence Division, 214 S. E. 6th Street, Evansville, Indiana, on January 3, 1967, at 10:00 A. M. That affiant is willing to make such appearance at an appropriate time, however, he will be unable to comply with the requirements of said summons and attachments on January 3, 1967.

Affiant respectfully requests of Special Agent Glen Johnson and the Intelligence Division of the Internal Revenue Service, U. S. Treasury Department, an extension of time as to the appearance date, and during said extended period of time he will make every effort to comply with the requirements of said summons and Attachments A, B and C and will, at all times, keep them advised as to his whereabouts and his progress.

Affiant, due to the distance and expense of the trip, requests an extension of three (3) months' time from the 3rd day of January, 1967, within which to do the things and matters above mentioned. Affiant further says that the threee (3) months' period of time is requested for two (2) purposes, one, and foremost, to try to comply with

the summons herein referred to, and two, for such business affairs as may relate to his contract of employment in Europe and Africa.

Further affiant saith not.

RAY RYAN
Ray Ryan

Subscribed and sworn to before me this 27th day of December, 1966.

GILBERT J. TIMBERLAKE
Notary Public

My com. expires 7-22-70.

STATE OF INDIANA
VANDERBURGH COUNTY } ss:

BEFORE THE U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
INTERNAL REVENUE DISTRICT OF INDIANA

Re: Tax Liability for the Calendar years
1957 through 1965, Inclusive
of
Raymond J. Ryan (a/k/a Ray Ryan and
Helen Ryan, 600 Lombard Street,
Evansville, Indiana, or, 218 Court
Building, Evansville, Indiana

Ray Ryan, being duly sworn upon oath, deposes and says that he is one and the same person as the Ray Ryan mentioned in the foregoing caption. That since service of summons on affiant, November 18, 1966, by Glen Johnson, Special Agent, affiant has attempted to comply therewith by doing the following things:

(a) In early January 1967, he left the United States by plane, flying first to London, England, and then to Zurich, Switzerland, where he talked to Max Zimmerman and requested the books, records and documents more particularly described in Attachments A, B and C of said summons and relating to

1. Mount Kenya Safari Club Establishment, Liechtenstein (a corporation operating in Kenya, East Africa).

2. Ryan Investments, Limited Kenya, East Africa.

3. Mawingo Limited, Kenya, East Africa.

(b) Max Zimmerman refused to permit affiant to have access to said records for United States Treasury Department examination and inspection.

(c) The books, records and documents of the corporations and firms mentioned in 1, 2 and 3 herein are not now nor have they ever been in affiant's possession, custody and/or control, except as nominee.

(d) Affiant may have been listed and named as a director of said firms, but as such never had possession, custody and/or control of said books, records and documents other than as nominee pursuant to the Zimmerman agreement.

(e) Affiant's only relation to any of said corporations was as a nominee, as set out in the agreement of December 28, 1958, with Max Zimmerman.

(f) A photo copy of the Zimmerman agreement has heretofore been furnished by affiant to Mr. Glen Johnson, Special Agent, under a restricted use basis. Affiant hereby withdraws the restricted use provisions and said Glen Johnson is authorized by affiant to use said agreement for any purposes connected herewith. Affiant further says he has never exercised the options provided for in said Zimmerman agreement.

Affiant further says he executes this affidavit to explain his inability to comply with the summons, and prays to be relieved of the provisions of the summons.

RAY RYAN
Ray Ryan

Kenya City of Nairobi Embassy of the United States of America. } ss.

Subscribed and sworn to before me this 8th day of March, 1967.

WILLIAM B. POGUE
William B. Pogue,
American Vice Consul

APPENDIX B

[Filed Mar. 29, 1968]

LAW OFFICES

SIMON, SHERIDAN, MURPHY, THORNTON & MEDVENE

625 South Kingsley Drive
Los Angeles, California 90005
DUnkirk 6-3800

AND

MILLER, MC CARTHY, EVANS & CASSIDY

Attorneys for Witness RAYMOND JOHN RYAN

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 1926—Mis.

In the Matter of the Production of

Records by RAYMOND JOHN RYAN, A Witness.

Affidavit of John Bateman Story in Support of Motion To Quash Subpoena Duces Tecum

AFFIDAVIT

I, John Bateman Story of Post Office Box Number 1500, Nairobi in the Republic of Kenya, make oath and say as follows:

1. *That* I am a Chartered Accountant practising in Nairobi in the Republic of Kenya.

2. *That* I am a Director of P. & M. Limited a limited liability company incorporated in Kenya. P. & M. Limited is now and has been since its appointment on the 20th May 1966 the Secretary of the following three limited liability companys namely:

Zimmerman Limited, Mawingo Limited and
Ryan Investments Limited.

3. *That* I am the Director of P. & M. Limited in charge of the above three companies and I am intimately aware of all matters pertaining to the composition of their respective Boards of Directors.

4. *That* Mr. Ray Ryan resigned from the Boards of Directors of all three Companies on the 7th day of March, 1967 and since that date the said Mr. Ray Ryan has held no official capacity in any of the said companies. Mr. Ray Ryan was replaced by Mr. M. Zimmermann.

5. *That* Mawingo Limited is the sole proprietor of the Mount Kenya Safaries Club, Nanyuki, Kenya.

6. *That* Mawingo Limited was incorporated on the 5th day of June, 1938.

7. *That* Ryan Investment Limited was incorporated on the 6th day of December, 1961.

8. *That* Zimmermann Limited was incorporated on the 16th day of November, 1961.

9. *That* the documents in the possession of and relating each of the above companies amounts to several thousands of folios.

10. That I am duly authorised by P. & M. Limited the Company Secretaries of the said three companies and each and every statement herein is based on my own personal knowledge acquired as the Director in charge of the Secretarial activities of the said P. & M. Limited in respect of the said three Companies.

Sworn at Nairobi this 22nd day of March, 1968.

Before Me:

U. S. KALSI

[Filed April 8, 1968]

LAW OFFICES
SIMON, SHERIDAN, MURPHY, THORNTON & MEDVENE
625 South Kingsley Drive
Los Angeles, California 90005
DUnkirk 6-3800
AND
MILLER, MC CARTHY, EVANS & CASSIDY
Attorneys for Witness RAYMOND JOHN RYAN

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 1926—Mis.

In the Matter of the Production of
Records by RAYMOND JOHN RYAN, A Witness.

Affidavit of John William Mills in Support of Motion To Quash Subpoena Duces Tecum

AFFIDAVIT

I, JOHN WILLIAM MILLS of Box 7099, Nairobi, Kenya, make oath and say as follows:

1. I am a British subject residing at Nairobi, in the Republic of Kenya.

2. That I am now and have been since December 1961 a Director of the following Corporations:

(a) Ryan Investments Limited,

(b) Mawingo Limited,

(c) Zimmermann Limited.

All three of the above named Corporations are limited liability Companies incorporated in Kenya.

3. That the Mount Kenya Safari Club, Nanyuki, in the Republic of Kenya is owned by Mawingo Limited and has no separate corporate existence.

4. That I am now, and have been since March 1966, Chairman and Managing Director of Ryan Investments Limited,

and Chairman of Mawingo Limited and Zimmermann Limited.

5. That Ryan Investments Limited was incorporated on the 6th day of December 1961. The Mount Kenya Safari Club began to be operated by its owner Mawingo Limited on the 20th May, 1963. Mawingo Limited was incorporated on the 5th day of June, 1938.

6. That I have examined a copy of a Subpoena from the United States District Court for the Central District of California addressed to Ray Ryan, a copy of which is now produced to me and marked "J.W.M. 1". Based on my personal knowledge and personal inspection of the records of Ryan Investments Limited, the Mount Kenya Safari Club, Mawingo Limited and Zimmermann Limited, as specified in said Subpoena, I am of the opinion that the said records would fill approximately eight four door filing cabinets and would weigh approximately 2,000 lbs.

7. That Ray Ryan resigned as a Director of Ryan Investments Limited, Mawingo Limited, Zimmermann Limited. Mr. M. Zimmermann filled the vacancy thus created and became a Director of the said three Companies. Very shortly afterwards I was appointed Chairman of the Boards of Directors of the said three Companies and since March, 1967, I as Executive Director of the said three companies have at all times since had custody and control of the books and records of the said three Companies and of the Mount Kenya Safari Club with the exception of the Statutory Books which are in the custody of P. & M. Limited, the Secretaries. Since the 7th day of March, 1967, when Mr. Ray Ryan resigned his Directorships, Mr. Ray Ryan has not had either custody or the right to determine to whom the records should be made available.

8. That I have been requested by Mr. Ryan to send the Corporate records of the above listed Companies to the District Court in Los Angeles, California, and have refused to comply with this request.

9. That in February, 1967, Mr. Ray Ryan instructed me to carry out the formalities necessary for the recordal of his resignation as a Director from all the Boards of all Companies in Kenya in which he held office. I carried out these instructions with regard to Ryan Investments Limited, Mawingo Limited, and Zimmermann Limited. Having done this I thought that I had fully complied with Mr. Ryan's instructions. I then assured him that his instructions had been carried out and that he was no longer on the Board of any extant Kenya Company. However, I have since learnt that in this I was mistaken. Mr. Ryan had previously been a Director of the 7 Up Bottling Company Limited, a Company incorporated in Kenya. In 1965 a Receiver and Manager was appointed over this Company by the Standard Bank Limited under powers conferred on the Bank by a Debenture. The Receiver sold all the assets of the 7 Up Bottling Company Limited and the Receivership was in due course terminated. I assumed that the 7 Up Bottling Company Limited had therefore ceased to exist in that it no longer had any assets. The 7 Up Bottling Company Limited has indulged in no trade of any sort since 1965 and has no assets and to all intents and purposes it has ceased to exist. However, unbeknown to me until yesterday, the Company still existed on the records of the Company Registry in Nairobi, and a search which I caused to be carried out has revealed that the last annual return filed in respect of the Company was filed on the 15th April, 1965, and shows interalia that Mr. R. J. Ryan is a Director of the Company. Thus, contrary to my express assurance to Mr. Ryan in March, 1967, and my further confirmation of this assurance on a number of occassions over the last year, I now discover that Mr. Ryan is still technically a Director of the defunct 7 Up Bottling Company Limited.

J. MILLS

Sworn at Nairobi this 28th day of March, 1968.

Before Me:

U. S. KALSI

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23,343

In the Matter of the Grand Jury
Subpoena of RAYMOND J. RYAN, Appellant.

Motion and Memorandum of the United States To Delete Certain Language From Court's Opinion

On May 19, 1970, the United States Court of Appeals for the Ninth Circuit filed its decision in this matter (No. 23,343). On May 25, 1970, the Government filed its motion "For Order Temporarily Withholding Further Public Dissemination of Court's Written Opinion", and on June 3, 1970, the Court granted this motion. On June 29, 1970, the Government filed its "Petition for Re-hearing and Suggestion for Re-hearing in Banc" in this matter.

Notwithstanding the Court's decision concerning the Government's Petition for Re-hearing, the Government moves this Court to amend its written opinion in this matter by deleting from its opinion the language appearing on lines four (4) through seven (7) of page four of the Court's typewritten opinion, said language referring to representatives of the Government of Kenya. The United States Department of State has concluded that "promulgation of the Court's decision with language in the last paragraph of the Court's opinion could be detrimental to the relations of the United States with Kenya and thus to the national interest of the United States" (see annexed affidavit of C. Robert Moore, Acting Assistant Secretary of State for the Bureau of African Affairs).

The Government understands Appellant's motion not to object to a deletion based on these grounds.

Respectfully submitted,

PHILIP R. MICHAEL
Philip R. Michael, Attorney
Department of Justice

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23343

In the Matter of the Grand Jury
Subpoena Duces Tecum of RAYMOND J. RYAN,
Appellant

Affidavit

C. Robert Moore, Acting Assistant Secretary of State for the Bureau of African Affairs in the United States Department of State, under oath deposes and says:

I have read the per curiam decision of the United States Court of Appeals for the Ninth Circuit in the case shown above which was filed on May 19, 1970 and the Motion for Order Temporarily Withholding Public Dissemination of Court's Written Opinion filed by Will Wilson, Assistant Attorney General, Criminal Division, United States Department of Justice, and the Appellant's response thereto filed by Herbert J. Miller, Jr. and others.

It is my opinion and the view of the Department of State on behalf of which I am authorized to speak concerning this matter, that the promulgation of the Court's decision with the language in the last paragraph of the Court's opinion could be detrimental to the relations of the United States with Kenya and thus to the national interest of the United States.

Respectfully submitted,

C. ROBERT MOORE
C. Robert Moore
Acting Assistant Secretary of
State for the Bureau of
African Affairs
United States Department of State

Subscribed in my presence and sworn before me this 8th day of July, 1970.

ERMINIA R. SCIARRINO
Notary Public
Washington, D. C.

My Commission Expires Sept. 14, 1973.

No. 70/6660

UNITED STATES OF AMERICA
DEPARTMENT OF STATE

to whom these presents shall come, Greeting:

Certify That C. Robert Moore, whose name is subscribed to the hereunto annexed, was at the time of subscribing the same, Acting Assistant Secretary of State for the Bureau of African Affairs, United States Department of State, and that full faith and credit are due to his acts as

In testimony whereof, I, U. Alexis Johnson, Acting Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this ninth day of July, 1970.

U. ALEXIS JOHNSON
Acting Secretary of State.

By BARBARA HARTMAN
Authentication Officer,
Department of State.

[Filed July 31, 1970]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23,343

In the Matter of the Grand Jury
Subpoena of RAYMOND J. RYAN, Appellant

Order

Before: JERTBERG, MERRILL, and ELY, Circuit Judges.

The Government's "Motion . . . To Delete Certain Lan guage . . . ." from the court's opinion in the subject cause is denied.

Judge Merrill would grant the motion.

Memo to Clerk Luck No. 23,343 July 29, 1970

All judges concerned having concurred in the attached Order, as indicated, you will please file.

WALTER ELY
United States Circuit Judge

OFFICE OF THE CLERK
U. S. COURT OF APPEALS

P. O. Box 547
San Francisco. California 94101

July 29, 1970

Messrs. Orrick, Dahlquist, Herrington
& Suitcliffe
405 Montgomery St.
San Francisco, Calif. 941014

Dear Sir:

The Petition for a Rehearing hereto filed in case No. 23343—In the Matter of the Grand Jury subpoena Duces Tecum of Raymond J. Ryan was this day denied.

Pursuant to Rule 41(a) and unless stayed by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of seven (7) days from the date hereof.

Sincerely,

WM. B. LUCK,
Clerk.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23343

IN THE MATTER OF THE GRAND JURY SUBPOENA OF RAYMOND J. RYAN, Appellant

Appeal From an Order of the United States District Court for the Central District of California

Motion for Order Temporarily Withholding Further Public Dissemination of Court's Written Opinion

WILL WILSON
Assistant Attorney General
Criminal Division

EDWARD T. JOYCE
PHILIP R. MICHAEL
Attorneys,
Department of Justice
Washington, D. C.

The United States Court of Appeals for the Ninth Circuit filed its decision in this matter (No. 23343) on May 19, 1970, and government counsel first learned of this decision on May 22, 1970. The government will soon know whether it will seek further review of this decision which was rendered in favor of the Appellant, Raymond J. Ryan. Pending this determination by the government, and because of certain language contained in the Court of Appeals' de-

cision itself which language the government feels may be harmful to international relations existing between the United States and foreign countries, the government requests this Court to withhold further public dissemination of the Court's written opinion. The government makes this motion in light of its present belief that it will request the Court to delete certain language from its writttn opinion whether or not the government seeks re-hearing of this case.

The language of the Court's opinion which is referred to by this motion is found on page four of the Court of Appeals typewritten decision, filed with the Clerk of the Court on May 19, 1970, and which relates to alleged actions performed by representatives of the Government of Kenya. The government realizes the instant motion is not the appropriate vehicle to present grounds for deletion of these remarks from the official opinion which ultimately is published in the official Court reports, but the government wishes to apprize the Court of Appeals of the Order of the United States District Court which sealed the transcript as to all remarks concerning the cooperation furnished by the Government of Kenya. Since certain of these comments considered singly and out of context may be interpreted in a manner detrimental to our relations with Kenya, the government moves that the Court withhold distribution of its opinion until counsel can more fully advise the Court on these matters.

Respectfully submitted,

WILL WILSON
Assistant Attorney General
Criminal Division

EDWARD T. JOYCE

PHILIP R. MICHAEL
Philip R. Michael
Attorneys,
Department of Justice
Washington, D. C.

APPENDIX D

[3] Los Angeles, California, Monday, September 23, 1968.

. . . . . .

[5] Mr. Joyce: Your Honor, the second matter that arose was in connection with Raymond J. Ryan's appearance before the Grand Jury. As you may recall, you directed Mr. Ryan to appear before the Grand Jury and to bring with him certain records of the Mawingo, Ltd., the Ryan Investment Company, Ltd. and other Kenyan corporations. Mr. Ryan in the meantime appealed to the Ninth Circuit. Your order directed him to appear before the Grand Jury on September 11th and that order was changed by the Ninth Circuit to September 23.

He attempted to obtain a stay from the Supreme Court and was unsuccessful. He appeared before the Grand Jury this morning and upon being interrogated as to whether he complied with the order of the court he is here to answer the questions on the ground that the answers would tend to incriminate him. He did not produce any records pursuant to the order of the court. We make application now for an order to show cause why the witness Ryan should not be held in civil contempt to [6] coerce his compliance with the order of the court. We request a forthwith determination.

Under Rule 42 the witness is entitled to notice in hearing and we would request that the order to show cause set down a time for hearing two days from now, that is Wednesday, if the court's calendar is sufficiently flexible.

The Court: Mr. Miller.

Mr. Miller: If the court please, Mr. Ryan did in fact appear before the Grand Jury this morning. He had gone to Kenya and he had made formal demand for the records.

This morning I hand delivered to the United States Attorney, to Mr. Edward Joyce, a letter from Mr. Ryan outlining his attempts at compliance and submitting to the U.S. Attorney and Mr. Joyce a power of attorney

which gives them any right, power, title or interest which Mr. Ryan may have with respect to obtaining, copying, having possession, or what have you, of any of the records subpoenaed. We made this power of attorney to Ramsey Clark or to his delegate.

I may tell the court that Mr. Ryan did go to Kenya. We sent telegrams to the registrar of copyrights. We received replies, all of which I have submitted to the United States Attorney and to Mr. Joyce [7] of the Department of Justice which demonstrates so far as I am concerned his inability to comply. To make sure there was no question about it we sat down and Mr. Ryan signed before a notary public a power of attorney which transferred to—

The Court: Let's get each thing in its order, Mr. Miller. Do you want a hearing now or do you want some time on a hearing.

Mr. Miller: If the court please, as I understand the rights of the person proceeded against under civil contempt he is entitled, as Mr. Joyce said, to notice in hearing. If the court please, I received the application for order to show cause this morning. I would request a minimum of two weeks in order to prepare and if necessary obtain interrogatories from Kenya. It will take that long, if the court please, for me to obtain whatever records, whatever answers I need in the form of interrogatories from Kenya.

Mr. Joyce: If the court please, we would oppose the two weeks because there is only one question that appears before the court at this time. Did he or did he not comply. That is the only question of fact. I think the cases hold that this does not relitigate.

The Court: Inability to comply, wouldn't [8] that be a defense?

Mr. Joyce: Only if the inability to comply arose between the time of the order of the court and the present time. This is not a relitigation.

The Court: No, I understand that.

Mr. Joyce: The original facts involved in the order—

The Court: I understand that. That is what they are talking about.

Mr. Joyce: That is not my understanding.

The Court: He is not a Kenya citizen and they are preparing for a showing that he is unable to comply with the order of the court because of facts which happened after the order. I haven't heard any talk yet about relitigation of the order.

Mr. Joyce: It was my understanding that is what was to be involved: That is, that his original statement or position that he was unable to comply is the same inability that—

The Court: That is what may come out. The court may find that that is sufficient in relitigation of the order and Mr. Ryan may be in contempt but he has an opportunity to show that these were not matters which were available to him at the time of the order and that he has not been able to comply with the order because of [9] something outside of the relitigation of the order itself.

Mr. Joyce: If that is the situation—

The Court: As I take it, the order now based upon what has happened basically is a valid order of this court which is subject to compliance. I take it the only defense to that inability to comply—

Mr. Joyce: Your Honor, I agree. If that is the understanding that this is limited to the time between the order of the court then we withdraw our objections to the two weeks.

The Court: Mr. Miller may try to relitigate this matter, that is up to him. I am sure he might try to do that.

• • • • • • • • • • •

[10] The Court: We will set it down for October 2nd, 1968 at 9:30 a.m. for hearing on the application of the Government for order of the witness to show cause why he should not be judged in civil contempt.

[11] Mr. Ryan: You are to return to this court on Wednesday, October 2, 1968 at 10:00 a.m.; do you understand that?

Witness Ryan: Yes, your Honor.

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[16] Los Angeles, California, Wednesday, October 2, 1968; 2:00 P.M.

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[23] Mr. Miller: • • •

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[24] I would suggest to the Court that the application filed by the Government in this cause is so woefully lacking in any effort to specify what the issues are in this petition, or application to show cause, as to leave me at sea—and I think any lawyer at sea—as to precisely what the issues are or will be in the proceeding.

Now, on this basis and this basis alone, it would be unfair and a denial of my client's rights to require us, without further specification, to continue forward with the proceeding. There is no [25] specification as to what has been violated here. Are we charged with violating a subpoena which has been quashed or modified by the Court's order? Are we charged with violating a Court order? Was it the Court's verbal order entered in court or was it in fact the Court's written order which was signed?

There is no specification as to that fact. There is no specification as to whether we are charged with failing to make application with the registrar of companies, whether our application was valid or invalid, whether perhaps we took steps which we shouldn't have or perhaps we took steps—or did not take steps which we should have. In other words, I am completely in the dark as to precisely what the Government is charging as to, A, what has been violated, if anything; and, secondly, what part of that which has been violated we are charged to defend.

I think basically the problem goes back to a misapprehension of Government counsel as to precisely what type of a proceeding this is.

There is no question that the cases cited by the Government tend to show that where there has been a hearing and a bankruptcy turnover order—and I'm talking about Maggio vs. Zytes, [26] that that ruling on possession is in fact one which does have validity in terms of res judicata. But I would submit to the Court, and this is really a very important point, in those cases cited by the Government—in Maggio vs. Zytes—in those cases wherein turnover orders have been at issue before the Court, those orders are, A, appealable, and, B, in the Maggio case were appealed all the way to the Supreme Court. Therefore you not only have a full-scale trial and hearing on a turnover order, but you do have an unqualified right to appeal to the Court of Appeals and from there petition to certiorari to the Supreme Court.

The Government has flatly taken the position before this Court, before the United States Court of Appeals for the Ninth Circuit and before the Supreme Court in the United States, in pleadings which they filed, that the order of this Court of July 25, 1968, is not in fact an appealable order. And I would suggest to this Court that on that basis, the attempt by the Government to equate this prior proceeding, which was in effect a motion to quash under 17, in essence an affidavit hearing with the type of full-scale trial with the full protection that a trial embodies under a turnover order, and a [27] right to appeal the turnover order to the Court of Appeals just absolutely does not apply to the facts of this case.

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[32] Mr. Michael: • • •

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[34] In all respects he failed to comply with the subpoena. He stands in contempt, and the order—

The Court: Let me ask you this, Mr. Michael:—

Mr. Michael: Yes, sir.

The Court: What is the order that is [35] the subject of the application for order to show cause re contempt? Unfortunately this file does not contain the original of the order to show cause. Do you have a copy of that?

Mr. Michael: I do, your Honor.

The Court: Well, that's the application. Where is the order?

Mr. Michael: I have the order, too, your Honor.

The Court: Let me ask you a couple of questions. What order is it of the Court that you are seeking to enforce?

Mr. Michael: It's the order of the Court, your Honor, I believe, of July 25 modified only in respect to the date by the Ninth Circuit. It was at that time that we came before the Court on a motion to quash.

The Court: All right, then is it the written order that was filed on July 25, or is it the order pronounced in court on July 25 that you are seeking to enforce?

Mr. Michael: Well, it's my understanding that the written order is just a reducing to writing of what was the oral order of the Court, but it's the order of the Court signed on July 25th.

[36] The Court: Well, which is the order you are seeking to enforce? The oral order which was pronounced in court, or was it the written order signed by the Court?

Mr. Michael: It's the written order signed by the Court.

The Court: Was that order served on Mr. Ryan?

Mr. Michael: Yes, sir. I have no—

The Court: Was it served on him? Because I have no return of personal service of the order.

Mr. Michael: I know that it has been served on him, yes, your Honor. I checked with the United States Attorney's office here to make sure that it was served.

If there was no certificate of service, that's just an administerial error.

The Court: You are going to have to show that, aren't you? If that's the order that you want enforced against him, he has to have knowledge of the order.

Mr. Michael: Well, I took steps to make sure the order was served, your Honor. Perhaps there is not a certificate of service attached to the [37] order.

The Court: Was the application for the order to show cause served on him?

Mr. Michael: Well, he stated in court today that he had the application, yes, it was.

Where is that?

Mr. Joyce: I don't know.

(Short pause.)

The Court: It was?

Mr. Michael: Yes, sir. I personally delivered that to Mr. Miller, myself.

The Court: Now, the application for the order to show cause would indicate that what he was at that time being requested by the Government to be held in contempt was for his failure to answer the subpoena duces tecum which was served on him on April 9th, 1968.

Maybe you can clear something up with me, because the order of the Court indicates that it was a Grand Jury subpoena which was served on March 5, 1968.

Mr. Michael: The subpoena was—

The Court: Requiring him to appear on April 15, 1968.

Mr. Michael: The subpoena was served [38] on March 5th, 1968, here in Los Angeles. It's that subpoena.

In one of the papers there is a typographical error. The date of April 9th is in there, which is in error. The date of the subpoena was March 5, 1968.

The Court: Well, do you think that this application and this order gives Mr. Ryan notice of what he is to meet?

Mr. Michael: Yes, sir.

The Court: In terms of what his obligations were before the Grand Jury, because, as I recall, at least the order pronounced in court and the order that was signed by the Court did not apply to all of the items of the subpoena which was served on March 5, 1968.

Mr. Michael: That's right, your Honor.

The Court: It was modified in certain respects so that they were talking about—we were only talking about and we only ordered Mr. Ryan, and he was under order at that time—there's no question about that—at the time of the oral order of the Court to produce on September 11th the documents referred to by the subpoena duces tecum which only pertained to Ryan Investment, Ltd. of Nairobi, Kenya; [39] and Mawingo, Ltd. of Nanyuki and Nairobi, Kenya, doing business as The Mount Kenya Safari Club of Kenya and that's it.

Mr. Michael: That's right, your Honor.

Yes, the Court's order modifying the subpoena to eliminate the 7-Up Bottling Company which the Court noted there was no evidence in the course of the proceedings. That was clearly stated by the Court and the subpoena is clearly modified by the Court's order. It explicitly refers to only those two enterprises, it makes no mention of the—

The Court: You don't give him notice that it is the modified—or the order of the Court. Here you say that you want an application for an order to show cause as to why he should not be held in contempt for failure to comply with the demands of the subpoena duces tecum.

Well, it isn't the demands of the subpoena duces tecum that he was under order to comply with at the time of the order of the Court. It was certain portions of that subpoena duces tecum, and the subpoena duces tecum was used by the Court only in terms of reference to certain documents which were set forth therein, not to the subpoena in its entirety.

[40] Mr. Michael: Well, your Honor, our position is that the subpoena stands as the Court order modified it, and that subpoena has not been changed, it's been altered by the Court's order, and the Court's order refers to the subpoena, and it is specific.

The Court: Mr. Ryan is under specific orders of the Court—not to comply with the subpoena, but to do certain

things, and that was the order of the Court. And if it did anything, it supplanted the subpoena duces tecum because the order of the Court made orally to him, which I think there was no question about, he was asked if he understood it, as I recall—

Mr. Michael: That's right, your Honor.

The Court: —and he said he did, and the order was pronounced in his presence as to what he was to do.

Mr. Michael: That's correct.

The Court: And it would be that order that would be the subject of any contempt, not the subpoena duces tecum because the order of the Court supplanted the subpoena duces tecum; and I think he is entitled to have that spelled out. It doesn't affect any difference in what has already been accomplished on September 23rd that he didn't comply with [41] the order of the Court, but I think he's entitled to know what he has to meet and what it is that the Court ordered that he didn't do, because he did appear, for instance.

Mr. Michael: In the Grand Jury, it gives—

The Court: One part of the order was that he was to appear, and he did do that, so he's not in contempt with that part of the order. He did not produce certain documents. Well, what documents were they that he didn't produce?

Mr. Michael: He didn't produce—

The Court: He may have produced some, and he may not have produced any. There is no indication in the application of what he was to produce and what he didn't produce.

Mr. Michael: He produced nothing that he was to produce, your Honor.

The Court: Well, I understand that from what you're telling me, but I think Mr. Ryan is entitled to know what he has to meet.

Mr. Michael: Well, he was asked by the Grand Jury, it says, "Do you recall Judge Real giving you the order," and he says, "Yes—."

The Court: I understand that, and that [42] may be the evidence of contempt, that may be evidence that he understood what he was to do, but that doesn't give him notice of what he has to meet on the order to show cause re contempt.

The Government may have abandoned some area of it, it may have gone in other areas of it, and he may have some defenses on some areas of it and no defenses on other areas of it, which he is entitled to put before the Court, and I think that even though this is a summary proceeding in contempt, whether it be civil—at least I think that—contempt, whether it be civil or criminal, is a summary proceeding, but even in a summary proceeding the respondent is entitled to know what he has to meet in that summary proceeding. He is entitled to notice and a fair hearing.

Mr. Michael: I agree, your Honor.

The Court: That at least is what due process is, and I just don't think that the application and the order comply with due process in terms of what Mr. Ryan has to meet on the question of whether or not he is in contempt of the order of this Court.

Mr. Joyce: Your Honor, may I speak to that?

[43] The Court: Certainly.

Mr. Joyce: At the time of the application for the order to show cause, the application had already been prepared; but at that time when I requested that the Court order Mr. Ryan to show cause why he should not be in contempt, I pointed out that he had come before the Grand Jury pursuant to the order of the Court but he had not, in compliance with the order of the Court, produced the records. And I think at that time the Court again verbally ordered him to show cause on today as to his contempt, and where there may have been a variance between the final order as signed, it is certainly that the order of the Court, the verbal order of the Court in his presence gave him plenty of notice as to what was to be carried on today.

The Court: That may be, but I don't have that before me and I don't exactly recall and there is nothing in the file—at least it hasn't gotten there yet, these files are a little behind time—that would indicate to me what I did tell Mr. Ryan at that time.

I'll give you an opportunity to get that transcript to to see whether or not that can be sufficient hearing—or if you already have it, [44] we can check it—or sufficient notice of the question of what he has to meet on the order to show cause re contempt.

I take it there is nothing that requires the notice to be in writing.

Mr. Joyce: No, that's correct, your Honor.

The Court: Just so long as he has notice.

Mr. Joyce: Yes, and we contend that he had notice.

Mr. Miller: If the Court please, I do have a copy of the transcript and I would like to read page 10. I will deliver this to counsel for the Government.

"The Court: We will set it down for October 2nd, 1968, at 9:30 a.m. for hearing on the application of the Government for order of the witness to show cause why he should not be judged in civil contempt."

In other words, this hearing, according to the Court's statement, was to be a hearing on the application for an order to show cause, and it was converted, in effect, into a hearing on the show [45] cause order by reason of the fact that an order was signed.

Mr. Joyce: Your Honor, my statement to the Court at that time was:

"The second matter that arose was in connection with Raymond J. Ryan's appearance before the Grand Jury. As you may recall, you directed Mr. Ryan to appear before the Grand Jury and to bring with him certain records of Mawingo, Ltd. and Ryan Investment Co., Ltd. and other Kenya corporations.

"Mr. Ryan, in the meantime, appealed to the Ninth Circuit.

"Your order directed him to appear before the Grand Jury on September the 11th and that order was changed by the Ninth Circuit to September 23rd. He attempted to obtain a stay from the Supreme Court and was unsuccessful. He appears before the Grand Jury this morning, and upon being interrogated as to whether he complied with the order of the Court, he is here to answer the questions on the—as to whether he has [46] complied with the order of the Court. His answers to the questions on the grounds that the answers would tend to incriminate him. He did not produce any records pursuant to the order of the Court. We make application now for an order to show cause why the witness Ryan should not be held in civil contempt to force his compliance to the order of the Court. We request a forthwith determination under Rule 42, the witness is entitled to notice and hearing, and we would request that the order to show cause be set down at a time for hearing two days from now—that is Wednesday—if the Court's calendar is sufficiently flexible."

And there was a discussion again about the time, and the Court set the hearing down for the—I have here a copy of that transcript supplied to me by Mr. Miller and tendered to the Court if the Court so wishes.

The Court: All right. In reading the transcript, although the application in the order does [47] not set forth with any specificity the matters which Mr. Ryan was to meet on the question of the order to show cause re contempt, the record does show that Mr. Ryan was in court on September 23rd, 1968, and was given notice that the Government made application for an order to show cause as to why he should not be held in civil contempt for not complying with the orders of the Court to produce on September 23rd, as amended from September the 11th by the Court of Appeals for the Ninth Circuit, the records, papers and documents referred to in the subpoena duces tecum pertaining to the operation of Ryan Investment, Ltd. of Nairobi, Kenya, and Mawingo, Ltd. of Nanyuki

and Nairobi, Kenya, doing business as the Mount Kenya Safari Club of Kenya.

The motion to dismiss the order to show cause on that ground, from lack of notice, will be denied.

The motion to dismiss the order to show cause on the grounds that it violates the Fifth Amendment in that compliance with the order would violate the Fifth Amendment right of the defendant against self-incrimination is denied.

Since the question of the custody and control of the records, at least up until the time of [48] the hearing on September—on July 25, 1968, was determined against Mr. Ryan, the motion to dismiss on the grounds that the order does not—or the application of the Government does not allege present ability to produce the records is denied, in that that is evidentiary and not a matter of notice and is not an affirmative duty of the Government to show ability to produce; it is a defensive matter of inability to produce, as I read the cases. And upon the other grounds set forth as previously raised by the respondent on the question of the quashing of the subpoena duces tecum, the motion to dismiss the application for order to show cause will be denied on the same grounds that the motion to quash the subpoena duces tecum heretofore heard by the Court was denied.

Now, we have the next application of completion of the testimony before the hearing.

Mr. Miller: If the Court please, may I address myself to two matters?

The Court: All right.

Mr. Miller: In the application for an order to show cause, and in the order to show cause, both are directed towards a failure to comply with the subpoena duces tecum, which does not—if I [49] understand what was said, and I did not go back over it—

The Court: No, I understand that, Mr. Miller, and assuming that the documents are a nullity, I think there is sufficient notice as required by the rule and by the "due process" clause of the Constitution in the hearing

of September 23rd, 1968, to Mr. Ryan of what the Government contended was his contemptuous conduct.

The only question now, I take it, would be the aspect of the due process which has to do with a fair hearing, which is what we are about to go into.

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[59] The Court: All right, let's continue the hearing on the order to show cause to November 6th, 1968, at 9:30 a.m.

And, Mr. Ryan, you are to return on November 6, 1968, at 9:30 a.m. Do you understand that?

Raymond John Ryan: Yes, your Honor.

The Court: We will continue the matter to October 14, 1968, at 10:00 a.m., my regular law and motion calendar, for you gentlemen to advise the Court as to what procedure you are pursuing. By that time you should be able to ascertain that.

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[19] Los Angeles, California, Monday, October 7, 1968; 5:30 P.M.

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[32] **Carl Hirschman.**

called as a witness herein, being first duly sworn, was examined and testified as follows:

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[70] Cross Examination

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[72] Q. Were you subpoenaed in the United States to appear before the Grand Jury? A. Yes, I was.

Q. Who served the Grand Jury subpoena on you? A. Here in California?

Q. Yes. A. This young man here (indicating).

Mr. Miller: May we have a stipulation that he pointed to Glen Johnson, agent of the Internal Revenue Service?

Mr. Joyce: I have no objection to the identification. I fail to see the relevancy.

Mr. Miller: I am not pursuing it any further.

Q. Pursuant to that Grand Jury subpoena were you required to bring certain documents to the United States? A. Yes, I was. It was subpoenaed that I was [73] to bring along all my documentation I had in my possession and to obtain a documentation—my legal department read it wrong, I believe. They only gave me along the documentation in our possession. We did not make an effort to get the documentation from Kenya and then I was threatened with contempt of court because I did not bring this along. I think this has been rectified in the meantime because Mr. Coleman, my attorney, had worked something out with the Government attorneys to—well, I have written since then and sent telegrams to Kenya to obtain the records which meet the approval of the Government attorneys.

. . . . . .

[75] Q. In compliance with the Grand Jury subpoena did you contact Mr. Mills and seek to obtain the records? A. I did.

Q. What was his response, if any?

Mr. Joyce: Objection, your Honor, hearsay.

By Mr. Miller:

Q. Did he produce the records? A. He did not, no.

Q. Do you know where the records of Mt. Kenya Safari Club are currently located? A. No, I don't.

Q. Do you know where the records of Mawingo, Ltd. are currently located? [76] A. No, I don't.

Q. Do you know where the records of Ryan Investments, Ltd. are currently located? A. No.

Q. Did you at some time know where those records were? A. No.

Q. Do you know who has physical possession of any of those records? A. No.

Q. When was the last time you went to Kenya, Mr. Hirschman? A. Last January.

. . . . . .

[3] Los Angeles, California, Monday, October 14, 1968, 11:00 A.M.

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Mr. Larroca: I would like to put this whole thing in context, if you will bear with me. I would like to refer to some notes to get some dates actually on the record.

As Mr. Michael said, your Honor directed in the last hearing on October 2 that we report to the court precisely what had been done in the way of agreement before you as to the taking of this Kenya testimony. This whole thing started so far as the Kenya testimony was [4] concerned on the 23rd when the issue of civil contempt first arose. I believe Mr. Michael asked the court for an order which would require a responsive cross interrogatory to be served within 24 hours rather than the longer normal time under the civil rules.

On the 25th we filed those interrogatories. On the 27th of September the Government responded and had their cross interrogatories. On the 28th we air mailed them to Kenya with expediting instructions to our counsel, Mr. Deverell, in Kenya.

Now, those interrogatories, which was really a deposition on written interrogatories, were taken pursuant to 28(b)(1) which is the notice provision or the fastest way you could possibly get them. At that time we were faced with the October 2 return date on the order to show cause. We felt we had to have it by October 2.

On October 7 Mr. Deverell received the papers in Kenya, Nairobi. By cable of October 8th we were advised by Deverell that neither of the witnesses would testify voluntarily but that they would testify if they were compelled to by Kenyan court process.

Now, the very next day we checked with the State Department on Kenyan law, that was October 9. On October 10 we hand delivered a letter to the government [5] followed by phone call. We told them of the situation, told them what happened. We advised them we were going to move

the court for letters rogatory under 28(b)(3) because that is the only way you can get a Kenyan court process. We asked them to join us. If they would do so in moving the court we would have no objection to what the Government always wanted, and that is oral examination of the witnesses. If they wanted to go over them and base them on the letters rogatory orally it was all right with us.

At the same time, I believe this was on a Friday, Mr. Michael suggested we get together on Monday morning, that we get in touch with the court to delay this day to day report a few days so we could come out here with something concrete and present something concrete to the court. This was fine with us because we said we are faced with a November 6th date. If we talk for a couple of days and we can't get any place will you agree to put off the November 6th date for a few days, at least the same number of days, because things are closing in on us now. Mr. Joyce said not for one hour would he consider putting the November 6th date over and that is where the matter stopped.

This morning I gave Mr. Michael a copy of our motion, notice of motion, memorandum for letters [6] rogatory together with the written interrogatories to go with them. I would like to ask the court now, I believe under your rules that I would have an order shortening time so that I could file this motion and that Mr. Michael acknowledge proper service of them at this time.

Also at this time either give us an opportunity to argue, present argument on our motions for letters rogatory or set a very quick hearing on it so we could get under way. We canot even initiate them without an order of the court. I would like to have the opportunity to present that argument to you now, sir.

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[8] The Court: There is nothing implicit in it. It is just getting the process started. Each thing will have to take its own place so far as the procedures are con-

cerned. But the process, if it does not get started and there is to be a delay then the delay is going to be longer.

Mr. Michael: That is right, it is in the court's discretion not even to issue the letters rogatory.

The Court: I understand that, but I think they should be given an opportunity to be heard if it is at all possible.

Mr. Michael: I agree, your Honor.

The Court: They ought to be able to present any defense. You are asking for pretty substantial penalties here and I think they ought to be given an opportunity to give everything they can in terms of why they don't comply with the court orders.

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[15] Mr. Michael: Perhaps we have done more work on this because that is what our solicitor has told us in Kenya. We have made four telephone calls. You have no objection to that aspect of it, as I understand it.

Thirdly, what we are asking for is that sworn testimony be taken. I think that is in the letter as you have phrased it, I am not sure it is in that sense. What would be occurring is sworn testimony. The power to subpoena, which is the power we have utilized under the court laws of Kenya be also available to this commission.

Mr. Larroca: Power to subpoena what?

Mr. Michael: Records, subpoena individuals, subpoena records if necessary. You are bringing witnesses before a commission.

Mr. Larroca: I would be interested in knowing in the civil contempt proceeding when the issue [16] is present ability what records precisely. Are you going to substitute this for a Grand Jury proceeding?

The Court: It might be the minutes of a corporation, I don't know.

Mr. Larroca: As of what date?

Mr. Michael: Pardon me.

Mr. Larroca: I just don't know how far you are proposing to go. We want to use this process—

The Court: I take it, as much as you are entitled to show that he does not have the power they are also entitled to show that he does have the power. I don't know what the Government's position is but it would seem to me from Mr. Hirschman's testimony the other day that one of the positions of the Government is going to be, I don't know Kenyan law, but there has never been a resignation by Ryan that is effective.

Mr. Michael: Certainly, your Honor, they can show records. If they can't be removed from the government of Kenya certainly they can be producible under subpoena which is under the power of the court of Kenya. This commission which will be set up, which you are requesting be set up, certainly has its power. Our solicitor has advised us of that. It has the power not only to produce witnesses but documents.

Mr. Larroca: If the issues are relevant [17] to this case I cannot object but I would have to reserve the relevancy objection.

The Court: Certainly.

Mr. Michael: I understand.

The Court: Like any deposition.

Mr. Michael: What takes place now has nothing to do with its admissibility in a judicial hearing. The whole thing may come back nine-tenths relevant from your standpoint or ours and it would have to be decided at that time. It is such an expensive process and it is going to involve so many people and channels that it should be as exhaustive as possible to avoid the necessity of having to repeat it.

Mr. Larroca: I would like to voice one objection, that is it seems to me that you are now on the verge, if you have not already crossed that border, of turning this civil contempt proceeding into the grand jury by extending the scope. You are now asking for subpoena power for documents. Are you now going to reach for the same documents that you tried under the grand jury subpoena?

If that is the case I would have some reservations because the issue of relevance—

The Court: That might end the whole problem if they can get those documents in that fashion. That will end the whole problem, won't it? It is legally [18] possible for them to get the documents that they want and then they won't need Mr. Ryan any further and that might just end it all.

Mr. Larroca: It might end it all if they can do this legally.

The Court: So there is no objection in that respect.

Mr. Larroca: No, I have reservations about using this particular process to implement the Grand Jury but if you want the records that way and you can get them under Kenya law—

The Court: It might end it all.

Mr. Michael: That is all we have been after for the last year.

Mr. Larroca: You could have gotten these letters rogatory in yourself.

The Court: In any event there is no problem in doing that if Kenya law provides for the subpoena power by the commissioner. I guess it can be done.

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[28] Mr. Larroca: May I be heard on this? If we can refer back a minute to the findings in the July 25 order. That order, of course, makes a finding, a very specific finding, that isn't specific. It says that at times the only finding that has been made is that at times subsequent to the beginning of a grand jury investigation Ryan has had custody and control. By deposition of Mr. Johnson, IRS agent, we understand that [29] that investigation goes back to 1963. We don't know exactly when it is that the finding of the court was as to possession and control. I'm trying to make a proffer for the evidence which I haven't heard yet. Our position is that first of all Ryan does not have the present ability today to comply with this order

and parenthetically I would add that is the only issue in a civil contempt proceeding.

The Court: No, but the question is when does he say he lost it.

Mr. Michael: We say he does have the ability.

The Court: Because if he lost it after July by his own act then he is in contempt of this court.

Mr. Larroca: Speaking academically, if I may, your Honor, on this one, we would be in contempt but he could not be in civil contempt. Civil contempt is only coercive in power and cannot be used to punish him for any act. So that if he is unable to do the act no matter what happened he cannot be punished for civil contempt. There may be other proceedings and other considerations but not under civil contempt.

The Court: The question is not whether he did realistically. The testimony of Mr. Hirschman, I don't want to prejudge, but the testimony of Mr. Hirschman [30] is that he has had no notice of the meeting of the board of directors, no notice of any withdrawal of Mr. Ryan. He has had no notice of any activity of Mr. Ryan in connectiom with these companies at least for the last two years.

Mr. Larroca: We would expect the testimony—

The Court: And he says he is still a director. If he is still a director I take it, I don't know what Kenya law is, but here there would be no effective meeting. The officers who were officers and directors in 1960 would still be officers amd directors. They may have submitted their resignations but resignation has to be accepted.

Mr. Larroca: We would expect that the testimony would encompass proof that at no time since Raymond Ryan had been umder the subpoena of March 5, 1968, that he had custody, possession and control; that he was shareholder, director or officer.

Mr. Michael: I submit we have litigated the period from March to July 25.

Mr. Laroca: I take very strong exception to that because where can you show me any finding that he did? There hasn't been any.

Mr. Michael: Read the record. I remember specifically Judge Real posing the question. He said, [31] "I don't care what happened before." This is either to me or Mr. Joyce, I think Mr. Joyce. "I want to know what the status is now," and that is what was decided, July 25.

Mr. Larroca: Your Honor, there has only been one adjudication in this case. May I point out to you Honor this: That adjudication on possession or control was made on July 25. It referred to some time in the past. Not only that but that order itself is not even final because as the Government has contended both to the Ninth Circuit and the Supreme Court it is not a final order. I don't see how it could be res judicata on the subject.

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[4] Los Angeles, California, Thursday, December 12, 1968, 4:45 P.M.

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[7] Mr. Murphy: Your Honor, the change in circumstances to which I refer is the fact that on December 10th, I believe it was, the Grand Jury which had commenced the investigation giving rise to this civil contempt proceeding returned an indictment against Mr. Ryan, which indictment concerned a conspiracy allegedly commencing August of 1966 and continuing to the date of the indictment, which dates would include the period of the alleged civil contempt.

If your Honor please, might inquiry be made of Mr. Michael as to whether or not this Grand Jury [8] continues in existence after returning the indictment, and whether or not they are continuing to work on Mr. Ryan or continuing an investigation concerning Mr. Ryan. I think that this would be an appropriate question to find out. Maybe these proceedings are moot.

The Court: Well, Mr. Murphy, so we have the record clear, on December 11, 1968, the application of—or I should say on December 10, 1968, the court entered an order expanding the proceedings to include criminal contempt. So in any event should the Grand Jury cease, the criminal contempt would still be pending before this court.

Mr. Murphy: If the court please, I am here at somewhat of a disadvantage in that we are here because the Government asked us to be here and because Mr. Ryan and his counsel sought to convenience Mr. Holden. We have not had an opportunity to thoroughly brief and argue, your Honor, and prepare for argument the question as to whether or not the application—or whether or not the court might consider vacating its order to enlarge the proceedings to criminal contempt, and we feel that we would hesitate to make such an argument at this time. I think that Mr.—and in fact I can represent to the court that without knowledge that the court had already ruled on the matter. Mr. [9] Larroca and Mr. Miller sought to get their authority and their arguments together so that they could succinctly present this point to the court, whether or not the criminal contempt in the circumstances of this case can be now applied or should be now applied and I am sure that they did it with full respect for the court and not knowing of the order, your Honor, I am sure captioned their motion in such a way to request the court to vacate its order rather than to change its order, but there are other factors, your Honor, that we respectfully submit come into play, notwithstanding the fact that an application has been made now to change these proceedings from civil to criminal and by virtue of the court's order such an application has been granted.

We have a subtle change perhaps arising out of the very—or arising out of the indictment. You see, as of the date of the indictment, Mr. Ryan became a defendant in a criminal prosecution. As of that date his appearance

before a federal grand jury without counsel would give rise to some very grave constitutional grounds, especially when that Grand Jury was investigating by virtue of the complaint itself or by virtue of the indictment, especially when the Grand Jury was investigating an offense for which they had returned an indictment. I am not sure that I am [10] making myself very clear, your Honor. It's a difficult point that I would respectfully submit that if Mr. Ryan's ownership or officer status with Ryan Investment Company or Mawingo Limited were in question, and is questioned by the indictment, an appearance by Mr. Ryan before a federal grand jury would, we respectfully submit, violate his Sixth Amendment right to counsel. He is certainly within a very sharp focus once the indictment has been returned.

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[12] The Court: Yes, Mr. Murphy, but we are not retrying the question of the order and the basis upon which the order was made. The question now is, is there an order, did he violate it knowingly, and if he did, he is in contempt in this court, and that is all. We are not going to relitigate on the question of [13] a contempt. Mr. Miller may try to do that, but he is not going to relitigate the question of whether or not there should have been an order in the first place.

Mr. Murphy: No, your Honor, but with reference to it, the Government will still have to prove beyond a reasonable doubt that a status existed. Is that correct? In other words, they cannot rely upon the order other than for the face of the order as to what it says. Is that correct, your Honor?

The Court: Well, they have to rely that the fellow that they brought in on the order to show cause is Raymond J. Ryan, the same one that was ordered. That doesn't mean they have to now relitigate the question of whether or not he was an officer in Mawingo or any of those other corporations. That has been litigated, whether or not

he had the capacity to get the records prior to the date upon which he was ordered.

Mr. Murphy: But that's the precise point that I am respectfully trying to make, your Honor, that when that was litigated, that was litigated at a civil standard.

The Court: It doesn't make any difference, Mr. Murphy. Are you trying to tell me that if the court makes a civil injunction and there are criminal contempt proceedings that are brought as a result of the [14] failure to abide by the injunction, that you relitigate the question of his status in terms of the civil injunction? The answer to that clearly is no.

Mr. Murphy: Your Honor, but it would look to his capacity to perform the acts and—

The Court: The performance of his capacity is only after the order.

Mr. Murphy: Yes, your Honor, and it—

The Court: Otherwise it was impossible for him to do it upon events after the date of the order.

Mr. Murphy: Yes, your Honor. Now in his capacity after the date of the order would, we very respectfully submit, be very much in issue and would be necessary to prove beyond a reasonable doubt—

The Court: It's the duty of the Government to prove that capacity, I take it, as part of the order.

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[20] Mr. Michael: * * *

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[21] The other points raised, prior to taking the testimony of Mr. Holden, I might respond to briefly. The civil contempt and the criminal contempt are still on the calendar. The Grand Jury does expire on December 22nd, at midnight of the 21st, at which time, of course, the civil contempt would become moot.

I do not anticipate, however, using this Grand Jury between now and that date. Of course, the criminal con-

tempt is different from the civil contempt, in that it was completed, in our opinion, at the time the respondent failed to produce the records, as directed by this court, before the Grand Jury, whereas the civil contempt deals with completely different matters, the matter of coercion to order the witness to produce the—to compel the witness to produce the documents and until he does so, to be held to some fine or incarceration.

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[22] Mr. Murphy: Counsel for the Government indicated that the Grand Jury in this matter is not anticipated to return into session, thereby rendering moot a civil contempt proceedings. After all, the civil contempt could be coercive in nature and only have any vitality if the Grand Jury were going to be in session, and if it has no legitimate business and if it is not going to be in session, we would respectfully submit that counsel for the Government on his own motion dismiss the civil contempt.

Mr. Michael: No, the Grand Jury is certainly available any time between now and Saturday, the 21st of December, to have Mr. Ryan appear before it and receive the documents that he has been ordered to produce. The Grand Jury does not contemplate a calling of any new business at this time. It certainly stands on the business already conducted, but no [23]further matters, new matters will be called on the Government's behalf before this Grand Jury, but if Mr. Ryan intends today, tomorrow or any other day before it goes out of session to produce these records, we will do everything in our power to immediately convene the Grand Jury and receive that testimony and those documents.

Mr. Murphy: We respectfully request your Honor's attention to the fact that counsel does not indicate that the Grand Jury intends to accomplish any business at all, that it would appear that they completed their business with the return of the indictment and that further use

of the Grand Jury under the circumstances would be certainly contrary to the established policies of the Department of Justice, looking back historically for grand juries to prepare for criminal trial as opposed to the use of grand juries for the purpose of returning indictments.

The Court: What is your motion, Mr. Murphy?

Mr. Murphy: I move to dismiss the civil contempt proceedings.

The Court: That motion will be denied.

Mr. Murphy: Thank you, your Honor.

[24] The Court: Before proceeding, just a moment.

Mr. Ryan, I do want to advise you that there has been an application by the Government to amend the order to show cause, from an order to show cause why you should not be held in civil contempt to an order to show cause why you should not be held in criminal contempt, and it is charged in the order to show cause and requested that you should be held in criminal contempt and punished for your disobedience of the court's order of July 25, 1968, directing that you, Raymond J. Ryan, comply with the Grand Jury's subpoena duces tecum.

It is charged also that Raymond J. Ryan appeared before the Federal Grand Jury on September 23, 1968, in Los Angeles, California, and failed to comply with the court's order of July 25, 1968, in that you declined to produce the documents validly sought by the subpoena duces tecum ordered by the court to be complied with on July 25, 1968, that your contumacious conduct occurring and following determination by the court that you, Raymond J. Ryan, had custody and control of the subpoenaed records and that pursuant to the requested amendment of the court's order to show cause of September 24, 1968, heretofore served on you and heretofore [25] announced to you in open court, all the proceedings conducted and pleadings filed and records relating to the order to show cause of September 24, 1968, to be incorporated into this criminal contempt application and applicable to this order

to show cause why you, Raymond J. Ryan, should not be held in criminal contempt.

Now, in connection with that you are ordered to appear before this court on December 16, 1968, at 3:00 p.m. and show cause as to why you should not be held in criminal contempt for refusing to comply with the order of the United States District Court directing the production of documents before the Grand Jury.

I do want to advise you also in that proceeding that you do have a right to have counsel represent you at all stages of the proceedings and to confront the witnesses who may be brought against you in that proceeding.

Do you understand that, Mr. Ryan?

Mr. Ryan: Yes, your Honor.

Mr. Murphy: If the court please.

The Court: And I might say just by way of passing that your motion was denied because presently there is no civil contempt pending before this court. There is now a criminal contempt pending, if [26] you will read the order.

Mr. Murphy: Your Honor, we haven't received a signed copy of the order. We have received a proposed order, but we just haven't received the signed order.

The Court: Show that to counsel.

Mr. Murphy: May I approach the clerk for the purpose of returning the order?

The Court: All right.

Mr. Murphy: Your Honor, I just haven't been able to find the operative language in the order indicating that the civil contempt is no longer involved. I am sorry, your Honor.

The Court: Let me see the document.

The application, Mr. Murphy, is to amend and supplement the order to show cause why he should not be held in civil contempt to compel his compliance with the sub poena duces tecum to include an order to show cause why he should not be held in criminal contempt and punished for disobedience of the order.

Now, the amendment by the order says that Raymond J. Ryan shall show cause at 3:00 p.m. on December 16, 1968, why he should not be held in criminal contempt for refusing to comply with the order [27] of the United States District Court directing the production of documents before the Grand Jury. That is really the only thing before the court.

The other order was amended by that order.

Mr. Murphy: So that the civil contempt no longer exists?

The Court: That is my interpretation of it.

Mr. Murphy: Thank you, your Honor.

Pursuant to Rule 42 and, your Honor, this was the first notice that we had that the court had signed an order in this matter, and pursuant to Rule 42 we would respectfully request additional time in which to prepare for the defense of the criminal case now as opposed to the civil proceedings.

I believe that the rule entitles us to reasonable time. I know that that is a question of fact and one which would be very difficult for me to—

The Court: Under the circumstances of the proceedings as they have now progressed, the court finds that the 16th of December of 1968 at 3:00 p.m. would be a reasonable time within which to prepare for the criminal contempt. Preparation for the testimony [28] and outstanding Letters Rogatory have been going on since sometime in October of 1968.

Mr. Murphy: Yes, your Honor.

The Court: The nature of the proceeding is not that much different.

Mr. Murphy: Yes, your Honor, but for the purpose of the record might the court note that it is after 5:00 o'clock p.m. on Thursday, December 12, 1968, the time that we received first notice of the court's order.

Mr. Michael: The record should also note, your Honor, that the Government first moved to amend the order to

criminal contempt Monday, December 9, and it was with that knowledge that counsel for Mr. Ryan agreed to the proceedings to be conducted today.

Mr. Murphy: I am sorry, Mr. Michael.

With the court's permission, might I inquire of counsel what he just said?

The Court: You want to read the statement of Mr. Michael?

(Record read.)

Mr. Murphy: Well, of course, we are not going to argue on that, your Honor. We take issue with the statement as submitted.

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[35] **William Franklin Holden.**

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please take the witness stand?

For the record, will you please state your name?

The Witness: William Franklin Holden.

The Clerk: Thank you.

Direct Examination

By Mr. Michael:

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[69] Q. To your knowledge, sir, where are the records located that pertain to the operation of the Mount Kenya Safari Club? A. To my knowledge they are with Mr. Jack Mills in the office in Nairobi.

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[72] Q. Did you appear before the Grand Jury on the first occasion pursuant to a subpoena? A. I appeared. It was my understanding that a subpoena would be serviced, that I would be serviced with a subpoena and I, in

lieu of being serviced, I agreed to appear, and it may be correct or not correct, but I am sure that I wasn't subpoenaed. I appeared as a voluntary witness.

[73] Q. Were you at any time made aware by any agents, officers of the Federal Government that they desired to have you, a director of the Mawingo Limited, bring any records of that corporation to the Federal Grand Jury? A. Yes, they asked that I produce—in the first interview I was asked to produce any records that I had or books pertaining to the Mount Kenya Safari Club or Mawingo Limited.

Q. Was your interview in the presence of Mr. Deane Johnson? A. That is correct.

Q. And at that point in time, did you tell the agents and officers of the Federal Government that you would attempt to secure the records? A. Yes. I stated that I had no records, and I have no files of records, nor did I have any in my possession, and that I would attempt to cooperate with them and get the records.

Q. Did you in fact attempt to cooperate with the Federal agents and secure the records of Mawingo Limited? A. Yes.

Q. And then you describe what you did in your attempt to cooperate. [74] A. On a trip following that interview I met with Mr. Jack Mills, the general manager of Ryan Investments, in Nairobi. I asked him for the records and if they were available. I said that I had been asked or requested to produce the records, and he informed me that books on Kenya corporations were not allowed out of the country of Kenya.

Q. He denied you access to those records, sir? A. That is correct.

Q. And as a shareholder and a director, did you request of Mr. Mills that he give you the records? A. Well, I am sure Mr. Mills knows I am a shareholder and a director. Yes, I asked him for them and I was denied the books.

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[76] Q. Was it your understanding that Mr. Mills—withdraw that question?

Did you make any other efforts to secure any records from Mr. Mills or Mawingo Limited for the purpose of bringing them to the United States District Court or to the Grand Jury with reference to the pending matter involving Mr. Ryan? A. Yes, I did.

Q. Would you tell us when these additional efforts were made?

Mr. Michael: I object, your Honor. I don't see the relevancy to allow this line of questioning. It has been pursued for a period of ten minutes, but I don't see any purpose of what Mr. Holden may have done with relation to the criminal contempt of Mr. Ryan, and on those grounds I would object to the question.

The Court: What is the relevancy, Mr. Murphy?

[77] Mr. Murphy: If the court please, it has been established by Mr. Michael in his questioning that Mr. Holden is a director, a shareholder and an officer. We are inquiring, one, what is his status as an officer? Mr. Holden has explained that officers within that organization, the offices were honorary and not working. The second point that I think we have established here is that the director of the corporation was not the principal executive officer.

The Court: What do his efforts have to do with this case?

Mr. Murphy: Your Honor, this witness has received a subpoena substantially similar to the one Mr. Ryan received.

The Court: So what?

Mr. Murphy: If the court please, if we are here to determine whether or not Mr. Ryan had power to comply, certainly we have to determine whether or not Mr. Holden, as a shareholder or as a director, had the power to comply with the subpoena, because if they were out of his reach as a director, shareholder or president of the corporation, certainly there would be an evidentiary and logical link to Mr. Ryan.

The Court: It doesn't follow at all, Mr. Murphy.

[78] Mr. Michael: I object, your Honor, on the ground it is a relitigation of issues already decided.

The Court: The objection will be sustained.

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[80] By Mr. Murphy:

Q. Mr. Holden, pursuant to the subpoena which has been served upon you, did you bring any records to court? A. No.

Mr. Michael: Objection, your Honor, on the same ground.

The Court: The objection is overruled to that question.

The Witness: No, I didn't.

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[83] By Mr. Murphy:

Q. Did you see Mr. Ryan in Kenya during the period of September of 1968? A. Yes, I did.

Q. Will you tell the court the purpose of Mr. Ryan's visit to you?

Mr. Michael: I object, your Honor, as not within the knowledge of the witness and not relevant to the hearing.

The Court: The objection is sustained.

By Mr. Murphy:

Q. Can you tell us the purpose as to your [84] understanding of Mr. Ryan's visit to you?

Mr. Michael: Object, your Honor, on the ground of relevancy.

The Court: Objection sustained.

Mr. Murphy: I can offer proof, your Honor, that Mr. Ryan called upon Mr. Holden to elicit efforts to secure records in order to comply with a subpoena that was served upon him. We submit that that in and of itself is highly relevant in this type of case with the issues involved here. Mr. Ryan was required by order of this court to make efforts to secure documents, and I think it is highly relevant as to whether he did make efforts, and this witness

has the opportunity of telling us whether or not he did and—

The Court: What has Mr. Holden's understanding got to do with it?

Mr. Murphy: Well, your Honor, if Mr. Holden—

Q. Did Mr. Ryan ask you to get any records, Mr. Holden?

Mr. Michael: Object, your Honor, on the ground of relevancy. I would state that counsel misstates the purpose of this hearing. It is a question as of July what the status was, not what Mr. Ryan [85] did afterwards to get someone else to produce the records for them.

The Court: You might go into the mitigation of the contempt, and for that purpose, and that limited purpose, the objection is overruled.

The Witness: Would you repeat that?

(Record read.)

Mr. Michael: I object on the additional grounds, your Honor, as hearsay as to what Mr. Ryan may have said.

The Court: The objection is overruled.

The Witness: Yes.

By Mr. Murphy:

Q. What did Mr. Ryan request you to do, sir? A. He asked me to get all of the books that I could possibly get referring to the Mount Kenya Safari Club and Mawingo Limited from Mr. Jack Mills.

Q. And did you make any effort to comply with Mr. Ryan's request?

Mr. Michael: I will object, your Honor, on the grounds of relevancy.

The Court: That objection is sustained. This man is under no duty to do what Mr. [86] Ryan asks or tells him to do.

By Mr. Murphy:

Q. Did you at any time subsequent to Mr. Ryan's request of you to secure the documents report back to Mr. Ryan as

to whether or not you were successful in getting the records?

Mr. Michael: Objection on the grounds of relevancy as to what this witness may or may not have done.

The Court: Objection sustained.

By Mr. Murphy:

Q. Do you know if Mr. Ryan attempted to secure any records or documents from Mawingo Limited, Mr. Holden? A. It is my understanding that he tried.

Mr. Michael: I object. It is not responsive.

The Court: No. He asked if he knew.

Do you know, Mr. Holden? Do you know?

The Witness: I can't say positively, no.

By Mr. Murphy:

Q. Of your knowledge, sir, what did Mr. Ryan do in September of 1968 in order to secure records [87] or books of Mawingo Limited?

Mr. Michael: Objection on the same grounds. The witness has stated he has no knowledge.

The Court: Objection sustained.

Mr. Murphy: If the court please, the question is asked of the witness' knowledge. Counsel objects on the ground that the witness has no knowledge. The question seeks—

The Court: He answered the question before that that he has no knowledge.

Mr. Murphy: Your Honor, may the answer of the witness be read back?

The Court: Yes.

Would you read the previous question and the entire answer of Mr. Holden?

(Record read.)

The Court: That is the answer.

Mr. Murphy: If the court please, the witness said he can't say positively. I asked him with reference to his

knowledge. There might be gradations with reference to being positive or not, and this is cross examination.

The Court: Mr. Holden, what did you see Mr. Ryan do with respect to securing these records, [88] not what somebody told you, but you saw?

The Witness: Mr. Ryan came to me and informed me that he was unable to get the records and asked me to get the records. This was in Northern Kenya, your Honor. Mr. Ryan chartered an aircraft—

The Court: Not what Mr. Ryan or anybody else told you, but what did you see Mr. Ryan do with reference to getting the records?

The Witness: I did not see anything, your Honor.

By Mr. Murphy:

Q. Did Mr. Ryan appear before you in a chartered aircraft in Kenya in September of 1968? A. Yes.

Mr. Michael: Object on the ground of relevancy.

The Court: The objection is sustained.

By Mr. Murphy:

Q. Following your visit with Mr. Ryan in Lake Rudolf in Kenya in September 1968, did you go with Mr. Ryan by aircraft to see Mr. Mills?

Mr. Michael: Objection, your Honor, on the ground of relevancy.

[89] The Court: The objection is overruled.

The Witness: No.

By Mr. Murphy:

Q. How did you transport yourself to see Mr. Mills—

Mr. Michael: There has been no testimony to that effect. I think he is misstating the record, your Honor.

Mr. Murphy: If counsel would let me finish the question, I added "if at all" to the end of the question. Perhaps if he would listen to the end of the question prior to the beginning of the objection, we might not have a problem.

The Court: The question is did you go to see Mr. Mills by aircraft?

Mr. Murphy: If at all.

The Witness: No.

By Mr. Murphy:

Q. Did you go to see Mr. Mills by any means of transportation or contact Mr. Mills following Mr. Ryan's visit with you at Lake Rudolf—

Mr. Michael: I object, your Honor.

By Mr. Murphy:

Q. —in September of 1968?

[90] Mr. Michael: Object, your Honor, on the ground what Mr. Holden may have done in connection with Mr. Mills is not relevant to the hearing.

The Court: The objection is sustained.

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[3] Los Angeles, California, Monday, January 27, 1969, 2:30 P.M.

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[5] Mr. Miller: If the Government is proceeding on two bases and two fronts, as it would be proper to proceed with one criminal trial, that would be one thing, but they insist on both, and I don't see that they have any choice but to accommodate us and to protect Ryan's rights. They have as much at stake in this as we do.

The Court: Perhaps both cases should be tried together, as long as the government has no objection to a jury trial on the content, shouldn't they?

[6] Mr. Joyce: Consolidation? That would solve a lot of problems, your Honor, if the two of them are consolidated and tried together.

Mr. Miller: Certainly a consolidation would remove a very objectionable part of the proceeding, because every case that has dealt with this matter, if the court please,

has said that where you put the trial—put the defendant to the test in two different proceedings—

The Court: Who has the other case?

Mr. Miller: Judge Curtis.

Mr. Joyce: Judge Curtis.

Mr. Miller: I mean the mere fact that I have to make this motion demonstrates why the two proceedings would prejudice him. If we—even when I was before Judge Curtis I had to explain just a tiny bit about this case. It's been picked up in the papers, and everybody is going to have their minds made up, and that's why this very motion demonstrates a problem.

Mr. Joyce: Without admitting that there is any overlapping of the two cases, we wouldn't object to a consolidation, but I do object to Mr. Miller continuously saying these are overlapping. These are two separate and distinct and deliberate destructions of records back in 1956 and—

The Court: He states his position. You are [7] restating it.

Let me take a recess and I will talk to Judge Curtis and see if we can resolve this between ourselves. That might be a problem.

(Recess taken.)

The Clerk: Miscellaneous 1926 in the Matter of Raymond J. Ryan; further proceedings.

The Court: All right. In that matter, Mr. Joyce and Mr. Miller, I have talked to Judge Curtis on the matter. He also agrees that the matter—that both matters, the matter here presently before this court and the matter which is presently before his court, should be consolidated. I lost the toss of the coin. So I will take both of the matters.

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[8] Los Angeles, California, Tuesday, June 10, 1969, 1:30 P.M.

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[46] Mr. Michael: May it please the court, addressing myself to the Government's application for amended order to show cause which was filed approximately the 12th day of February, 1969, Miscellaneous 1926.

This motion, your Honor, of the Government was merely a recapitulation of the order to show cause which was directed to Mr. Ryan originally on September 23, 1968, following an appearance by him before the Federal Grand Jury in Los Angeles. There is nothing in this new motion to show cause.

Following the motion to show cause the defendant requested and was granted a jury trial. In order to have his pre-sentence or charge to be read to the jury the Government framed this particular application for an amended order to show cause. It does not amend the order to show cause in any substantive way whatsoever. It merely makes clear what it is that Mr. Ryan must show cause about, purely a fact of refusal to produce certain records before the Federal Grand Jury following an order by this court that he produce those records.

The order to show cause is specific, follows the dictates of federal rules 42 indicating what aspect of [47] the court order Mr. Ryan is being asked to show cause why he did not obey. It is that aspect of the order which required him to produce the books and records of the Mount Kenya Safari Club and of Ryan Investment which he was able to bring from Kenya. It did not deal with that order as to making certain records available for copying in Kenya. It did not deal with those records which would bring about a violation of Kenya law but merely the records, as the court stated, the books, records, papers and documents of Ryan Investment and Mount Kenya Safari Club not including the books of account, the minute books and the list of members, which as we know under Kenya law requires certain steps to be taken before they can be removed from that country.

The Government would submit that this order is entirely appropriate. It changes nothing which has occurred thus far in these proceedings. It is a matter of which Mr. Ryan has had ample notice orally and in writing by your Honor and by papers filed by the Government. And it would change nothing nor affect any of the motions heretofore filed in this case or which are now pending before this court.

Mr. Miller: If the court please, Herbert Miller for the defendant Ryan.

I will withdraw our opposition to the motion [48] to file the amended order to show cause.

If the court please, I am concerned about some of the language of the order to show cause but I feel that I can deal with that by filing a motion for bill of particulars.

Specifically, I am still very concerned because nowhere has the Government specified its request from defendants of long standing, specified which order in fact the Government claimed the defendant did violate, whether it is oral or the written order. But if the court please, I believe we can do that by filing a motion for bill of particulars.

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[3] Los Angeles, California, Monday, June 30, 1969, 10:00 A.M.

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[7] Mr. Miller: Addressing myself, if the court please, to the court's order of July 25 and the subsequent order to show cause which was signed by this court on June 10 of 1969.

[8] In the first place the order to show cause is based on an improper and unlawful order, namely, the order of July 25. In order for that July 25, 1968 order to have any legal binding effect it would have to be supported by proper findings. The only finding in that order, which

was a piece of paper presented to the court by the Government, declared that Ryan at times before and after the commencement of the investigation by the Treasury Department and the Department of Justice has had control of the records, papers, and documents referred to in the subpoena.

The record in this case demonstrates two things: One, the Department of Justice commenced to investigate Raymond Ryan in 1961 by their own statement; two, in 1964 the Internal Revenue Service commenced to investigate Ray Ryan and proceeded to interrogate people concerning his activities all over the United States. They have vested no finding in that order that Ryan had custody and control of the records in question on July 25, 1968, which was the date the order was entered.

Now. the Supreme Court of the United States has traced the history of the requirement that there be some type of a finding or reason supporting the issuance of the order of the type that the court entered here. It started out in Section 19 of the Clayton Act years ago. And the concept was that the court should not use its power, [9] should not use its judicial power unless it expressed the basis therefor.

Section 19 of the Clayton Act subsequently was amended and was replaced by Rule 65 of the Federal Rules of Civil Procedure. But the concept is the same whether we are talking about the Clayton Act, whether we are talking about the Federal Rules of Civil Procedure or whether in fact we are talking about the concept of due process and fairness.

The Supreme Court in the International Longshoremen's case, which was decided in 1967 and which has been cited at length in the pleadings filed with your Honor, points out that where the court uses its powers in order to compel or to enjoin conduct that that judicial power must be bottomed and premised on a proper order.

And as the Supreme Court said in 1967 in that case, if the order is invalid then the entire proceeding falls.

In that particular case the court flatly held that since there was no adequate finding, no adequate statement of reasons as to why the order issued, that therefore the basic order was invalid and the subsequent contempt citations whereby the defendants were held guilty of civil contempt, sentenced to pay a fine, fell because of the invalidity of the original order.

[10] Now, that case clearly demonstrates that the July 25 order is invalid and that order being invalid it follows inexorably that the June 10, 1969 order to show cause must fall with it.

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[24] The Court: Your position is an oral order to produce documents is not sufficient.

Mr. Miller: I do not know to this day, if [25] the court please. I do not know to this day whether the Government is charging Ryan with a violation of the written order or a violation of the oral order. I have heard statements in this court which end up being completely unclear to my own mind. The order to show cause itself does not demonstrate with any clarity, in fact, it is very ambiguous on this very point, what order is Ryan supposed to have violated. We are now on our third—

The Court: Well, Mr. Miller, if your position is that there was no written order, if your position is that there is no written order because of the rules then the only thing that is outstanding is an oral order, isn't it?

Mr. Miller: Yes, sir.

The Court: There is no question about that, is there?

Mr. Miller: If I may address the court to the validity of an oral order under the circumstances of this case.

If the court will proceed on two bases it will be demonstrated clearly that there cannot be an oral order with respect to the type of conduct required of the defendant in this case. Truly and surely the court can issue oral orders with respect to conduct in the courtroom, the setting of dates for trials and that type of [26] thing. There is no question about that. But in the cases we cited

to the court state flat out that in view of the recent amendment to the Federal Rules of Civil Procedure there is no longer any such thing as an oral judgment or order of the type here. I don't have the citation in front of me but it has been filed in one of our earlier pleadings and I will attempt to obtain that and submit it to the court. It is a flat statement out of Barron and Holtzoff to that effect, that is one thing.

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[37]

Mr. Larroca:

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[39] Following the turnover to the IRS agents Ryan was excused from appearing at the Grand Jury. Special Agent Johnson has admitted that he has consulted with Justice Department attorneys who are handling the Grand Jury investigation by the Grand Jury which issued the subpoena which forced production by July 25. And more, he has continued to cooperate and coordinate with Department attorneys. He has been in Kenya several months participating in the court proceedings, if I might add, in violation of this court's order.

Now, he in deposition claimed to have documents that indicated Ryan was an officer or director of the companies as of October '68. In that same deposition he refused to identify these documents. He refused to answer any questions about his activities in that deposition. And the Government has admitted to this court very early in these proceedings that the scope of the Grand Jury investigation was the ownership of the Mount Kenya Safari Club. Now, with that background I would like [40] to address myself to the specific requests for a bill of particulars.

One of them has nothing to do with this, the first one. We would still like to know what order Ryan is alleged to have disobeyed.

We want to know because we have to structure our defense whether we are going to be defending against the

oral order or against a written order. It makes a difference because the Government has put us in this position, it is like telling us you have been indicted for violation of a certain section of the U. S. Code and it has an A and B but we are not going to tell you whether it is A or B. We will tell you later.

We have been asking since October 2 whether we violated the written order or the oral order and we cannot get an answer. That was the first bill of particulars.

The Court: Do you think they are any different?

Mr. Larroca: Yes, sir.

The Court: How are they different?

Mr. Larroca: They would be different in legal effect.

The Court: No, not legal effect. How are they different in their content?

[41] Mr. Larroca: One has a reference to a subpoena, the other one doesn't. If it has a reference to a subpoena in the written one it would be violative of Rule 65. You can't have a reference—

The Court: That's the legal effect. What effect do they have, they both order him to produce certain records at a certain time and certain place before the Grand Jury?

Mr. Larroca: Yes, sir.

Tht Court: In that respect they are no different, are they?

Mr. Larroca: No, they are not, sir.

The Court: The other question is a question of legal efficacy only.

Mr. Larroca: I can't agree to the first one.

The Court: Well, how are they different? What records are different in each order?

Mr. Larroca: One order refers to the subpoena, the other one does not. But the legal effect is why we need the answer.

The Court: But what records are different because of the reference to the subpoena or the direct reference to the records? What records are different in each order?

Mr. Larroca: Well, are we now saying that [42] the order to show cause is limited only to a refusal to produce here in Los Angeles? Remember that the order also has another part which says, must do acts A, B, C and D in Kenya. It didn't just say produce certain records here.

The Court: I understand that, Mr. Larroca, but I take it the Government has chosen to proceed on the theory that the records were not produced before the Grand Jury.

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[50] The Court: What is it that is the violation of the due process?

Mr. Larroca: Many things, all of which—

The Court: Many things, what does that mean? It may mean one thing to you and something else to me. What do you mean by many things?

Mr. Larroca: Let's take one. For example, the fact that the IRS over a long period of time has served a series of administrative subpoenas, has refused to enforce them, has turned to the Grand Jury process to obtain the same information, with it being convinced that Ryan's replies were lies and then pust that proceeding forward to the point where Ryan is faced with a choice as Mr. Miller has [51] indicated of taking action which shows a status which puts him in jeopardy or facing a contempt. That is one.

The Court: Well, Mr. Larroca, does it make any difference in terms of the argument of Mr. Miller whether it was ten years that that happened or that it just happened this one day? I don't think it makes any difference; if Mr. Miller is right in his position with reference to the privilege against self-incrimination in this matter then it doesn't make any difference whether that investigation took ten years or a day, does it?

Mr. Larroca: The period of time does not make a difference.

The Court: Because that is a Fifth Amendment privilege against self-incrimination. Now, what are the due process things that you are talking about?

Mr. Larroca: The abuse of the Grand Jury process.

The Court: I beg your pardon.

Mr. Larroca: The abuse of the Grand Jury process.

The Court: Abuse of the Grand Jury process?

Mr. Larroca: That would be one. Yes, sir.

The Court: In what fashion, Mr. Larroca? If there was an indictment returned against the defendant by the Grand Jury how is that process abused?

[52] Mr. Larroca: I am not talking about the indictment, sir. I am saying that if the IRS does not follow up on its statutory administrative channels to enforce subpoenas but then through cooperation and extensive cooperation with the Justice Department brings itself into a Grand Jury proceeding, in fact the Grand Jury proceeding has the same object according to the Government counsel, to find out the ownership of the Mount Kenya Safari Club. That if this Grand Jury proceeding, and what they are after is to get information for IRS, for what they have refused to follow the statutory method to get, that that is an abuse of the Grand Jury process. When this court implements it, it is an abuse of this court's process.

The Court: Well. you might be interested to know that I happen to feel, unlike other judges, except one that is in Massachusetts, that it is the Grand Jury process which is the proper vehicle for the Internal Revenue to do their criminal investigation and not the summons process.

Mr. Larroca: I am sorry to hear that, your Honor. That is all I can say.

The Court: The Grand Jury at least has some protections which the summons process has none of.

Mr. Larroca: There are a couple of circuits that don't agree with you, your Honor.

The Court: I know that, including the Ninth [53] Circuit, so I follow the circuit reluctantly.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 758

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND J. RYAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

While recognizing the validity of the finality rule of *Cobbledick* v. *United States,* 309 U.S. 323—as indeed he must in light of its repeated reaffirmance by this Court and the lower federal courts—respondent weakens the vitality of that rule by arguing its inapplicability to this case.

A. Respondent urges (Res. Br. 21–37) that the order of the district court imposed affirmative obligations beyond those permissible under a subpoena *duces tecum* and that accordingly the order was a mandatory injunction having an appealable life of its own under 28 U.S.C. 1292(a)(1).

1. A fair construction of the original subpoena (A. 11–12) obviously carried with it an implicit directive that all reasonable efforts be taken to comply with its

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terms. "A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if discovered at the end of the chase." *United States* v. *Bryan*, 339 U.S. 323, 331. Respondent did not seek to comply, but instead moved to quash, alleging, *inter alia*, that he could not fully comply as to certain records because of the restrictions of Kenya law. Following proceedings over several months, the district court found that respondent had control over the records and directed that he request Kenya authorities to release certain of these records and if that request be denied to make these records available for inspection and copying in Kenya (A. 63–64). It is beside the point whether the subpoena itself could have contained these modifying conditions since the subpoena was enforceable by the court and clearly subject to modification by it. Compare Rule 17(c), F. R. Cr. P.; *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 220–221. Notwithstanding respondent's contrary claim, the court acted within its power and did ease the burden of the original subpoena.[1]

The cases cited (Res. Br. 23, 34–35) for the proposition that the modifying order was beyond the

[1] Despite respondent's repeated exception to our view that the court's order eased the burden of compliance (Res. Br. 24–26), it did just that. Respondent could have been held in contempt had the district court without more simply denied his motion to quash. Even if erroneous, that denial would not have been appealable; appellate review would necessarily have had to await a finding of contempt. See *Will* v. *United States*, 389 U.S. 90, 98 n. 6. By issuing the order which specifically afforded reasonable modes of compliance as to the restricted records, the district court in a very real sense removed this dilemma and eased the burden of compliance.

court's power are wide of the mark. *Application of Chase Manhattan Bank*, 192 F. Supp. 817 (S.D.N.Y.), simply recognizes that a court should take account of foreign law by modifying a subpoena *duces tecum*; indeed it cites as authority *Securities and Exchange Commission* v. *Minas de Artemisa*, 150 F. 2d 215, 218–219 (C.A. 9), where the court had restructured a subpoena *duces tecum* to comply with foreign law (see our discussion in our opening brief, pp. 18–19, n. 13).

Nor do cases like *Amey* v. *Long*, 9 East 473, 103 Eng. Rep. 653 (K.B. 1808), or *Munroe* v. *United States*, 216 Fed. 107 (C.A. 1), aid respondent.[2] In essence, they hold that a person who is directed to produce papers assertedly in his possession and control which are, in fact, in the possession and control of others may not be held in contempt for failure to produce. They do not suggest that he may not be required to take reasonable steps and make good faith efforts to produce records in his actual or constructive possession; and they do not focus upon the question of appealability. Respondent was not required to produce papers in the possession of others; he was simply required to ask Kenya authorities to allow him to produce certain documents which the court found were

[2] *Amey* v. *Long*, involved a subpoena at a trial, 9 East 473–474; while *Munroe* involved a grand jury subpoena, and was decided in 1914 at a time when there may have been a question (as the opinion itself indicates, 216 Fed. at 112–113) whether an individual within the court's jurisdiction could be required to travel outside the district of his own residence much less to a foreign country to obtain documents. *Munroe* was decided twelve years before Congress enacted the precursor to present 28 U.S.C. 1783. See *United States* v. *Thompson*, 319 F. 2d 665, 668–669 (C.A. 2).

under his control in that country or, if that effort failed, to permit inspection by agents of the grand jury in Kenya.[3] Respondent should not be heard to equate the reasonable directives in this case with one that would require a witness "to sue and labour in order to obtain the possession of any instrument from another for the purpose of its production afterwards by himself, in obedience to the subpoena." *Amey* v. *Long, supra,* at 483, 103 Eng. Rep. at 657.[4]

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[3] Respondent misconceives the import of the order by contending that the second alternative made records available to Internal Revenue Agents "without the slightest safeguard that they would not be used in a thoroughly impermissible way to initiate or sustain civil tax assessments" (Res. Br. 29). Read in its entirety, the thrust of the order was that the government agents who were to be permitted to examine the records were agents of the grand jury and could not disclose the information to any other body or use it for any other purpose without a subsequent order of the court. If respondent had any doubt on that score he could have requested the court to make this implicit directive explicit. There is nothing to show that the grand jury was doing anything more than seeking the documents in accord with its broad-ranging investigative authority. See *e.g.*, Douglas, J., dissenting in *Hannah* v. *Larche*, 363 U.S. 420, 497–499, for a summary of the broad role of the grand jury in the American system of justice.

[4] Respondent is thus not on sound ground in his reference to a witness' obligations under a subpoena regarding papers in the custody of a "State Court" or in possession of a person who "has an adverse claim" to them (Res. Br. 27) or of a "close friend" who had custody or control (Res. Br. 33–34). The challenged portion of the order here in issue did not compel respondent to bring a law suit against any one or attempt to "persuade" another who had "custody and control" (Res. Br. 34) to give them up. It simply required that he "make application" to appropriate Kenya authorities and if "unable to secure the consent of such authorities for the removal of certain of the documents in his control to make these available for inspection in Kenya (A. 64).

2. The cases relied upon by respondent in contending that the order was appealable under 28 U.S.C. 1292(a)(1) are not persuasive. He makes no mention of the leading decisions of this Court which have interpreted the interlocutory remedy of Section 1292(a)(1) quite narrowly. See, *e.g.*, *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 180–182, and *Switzerland Cheese Association, Inc.* v. *Horne's Market*, 385 U.S. 23, discussed in our opening brief at pp. 21–22. Instead, he relies upon cases whose relevance is at best remote and tenuous (Res. Br. 26).

B. Respondent further asserts that the order would have been appealable had the district court done nothing more than deny the motion to quash. This seems a surprising assertion in light of respondent's insistence that *Cobbledick* is still good law. At all events this claim is without merit.

1. To the extent that respondent appears to be urging (Res. Br. 39–41) that a subpoena *duces tecum* may not be addressed to an individual to obtain corporate records under his control in a foreign country, that contention finds no support in the present-day cases of this Court. (See our opening brief, p. 18 n. 12.)[8] Nor do we, in any event, perceive the relevance of that contention to the issue of appealability.

[8] At the same time, respondent argues (Res. Br. 35–36) that the government should have requested issuance of a subpoena under 28 U.S.C. 1783(a). But that section authorized the issuance of a subpoena to "a national or resident of the United States *who is in a foreign country* * * *" [emphasis added]. Since respondent was in this country when the subpoena was issued, that provision by its express terms is inapplicable here. Cf. Rule 17(e), F.R. Cr. P.

Insofar as respondent is contending (Res. Br. 36–37, 39) that the delay and cost inherent in requiring one to travel overseas to obtain a substantial volume of documents takes the case outside of the *Cobbledick* rule, he is overlooking the facts of this record and urging a distinction not subject to orderly and foreseeable application. The cost and delay argument has little force in the light of respondent's rejection of the trial judge's offer to relieve him of the obligation to bring *any* records from Kenya by incorporating in his order the government's suggestion that respondent permit copying there (A. 52–62, 64; 1 R. 65–66). Even putting this to one side, compliance with any order to produce contains an inherent element of delay—whether a federal grand jury sitting in Los Angeles seeks documents which are in Kenya or, for that matter, in New York. To adopt volume or location as the test would deny any certainty to the *Cobbledick* rule.

2. The cases relied upon by respondent where appeal has been allowed as exceptions to *Cobbledick* are unconvincing. Most have nothing to do with grand juries and others fall under long-standing exceptions which we recognized in our opening brief, pp. 25–26 n. 20.[6]

[6] For example, *First National City Bank of New York* v. *Aristeguieta*, 287 F. 2d 219 (C.A. 2), involved a district court order in an extradition case granting Venezuela's motion that certain banks produce records deemed relevant to the extradition proceedings. In holding the order appealable, the Second Circuit distinguished *Cobbledick* on familiar and long accepted grounds—*i.e.*, that if review was not then allowed, the bank's contentions would never be subject to review and that extradition is a

A further word is in order regarding respondent's reliance upon *Perlman* v. *United States*, 247 U.S. 7, and *Schwimmer* v. *United States*, 232 F. 2d 855 (C.A. 8). *Perlman* involved documents first produced in a civil suit which had been concluded with the condition that the documents should remain impounded in the custody of the Clerk and the evidence should be perpetuated for use in future cases between the parties and their privies (see 247 U.S. at 9). When the United States sought to have the exhibits released to a grand jury to consider whether Perlman had committed perjury, Perlman, claiming ownership of the property, sought to have such use barred on self-incrimination grounds. The rationale of the Court's decision that the order denying his motion was appealable—as interpreted in *Cobbledick, supra*, 309 U.S. at 328–329—was that to "have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim." *Schwimmer, supra*, was of the same cast. There the books

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unique and self-contained proceeding analogous to proceedings before administrative agencies. See 287 F. 2d at 222–223. This latter distinction was reaffirmed in *In re Letters Rogatory, etc.*, 385 F. 2d 1017, 1018 (C.A. 2), in reliance upon *Aristeguieta*.

The other cases cited by respondent—*e.g.*, *Saunders* v. *Great Western Sugar Co.*, 396 F. 2d 794 (C.A. 10); *Covey Oil Co.* v. *Continental Oil Co.*, 340 F. 2d 993 (C.A. 10); *In re Wingreen Co.*, 412 F. 2d 1048 (C.A. 5); *McDonnell* v. *Birrell*, 321 F. 2d 946 (C.A. 2); *Mosseller* v. *United States*, 158 F. 2d 380 (C.A. 2)—are equally far afield or consistent with prevailing rules, and have nothing to do with this case.

were in the custody of a company which had produced them pursuant to subpoena, when Schwimmer, the alleged owner, moved to preclude their submission to the grand jury. To the extent that these decisions, and the similiar decision in *United States* v. *Guterma*, 272 F. 2d 344 (C.A. 2), have vitality in light of this Court's subsequent decision in *DiBella* v. *United States*, 369 U.S. 121,[7] they are readily distinguishable from the case at hand. For here if respondent is found in contempt, he will still have an opportunity to litigate on appeal the validity of the original order before the grand jury would see the records.

[7] Doubt as to the present-day validity of *Perlman* not only is suggested in the opinion in *DiBella* itself, *supra*, 369 U.S. at 124, but appears from other sources. See, *e.g.*, *In re Grand Jury Investigation of Violations*, 318 F. 2d 533, 538 (C.A. 2), petition for certiorari dismissed, 375 U.S. 802.

Professor Moore has taken the view that *Perlman* and the cases which rely upon it (like *Schwimmer*, *supra*) are wrong and have not survived *DiBella*. As he points out "Perlman, if he had been indicted would have been entitled to object to any use of the papers at his trial and, if convicted, would have been entitled to appellate review of any ruling with respect to their use. In any event, *Perlman* would appear not to have survived more recent decisions of the Supreme Court, most notably, *DiBella* * * * that stress the high undesirability of interlocutory appeals in criminal cases." 9 Moore's *Federal Practice* (1970 ed.) ¶ 110.13[11], pp. 192–193. The other recent decisions would include, *e.g.*, *United States* v. *Blue*, 384 U.S. 251, *Costello* v. *United States*, 350 U.S. 359, and *Lawn* v. *United States*, 355 U.S. 339, holding that defendants have no complaint as to evidence used before a grand jury even if allegedly obtained in an unconstitutional manner.

3. In sum, we agree that *Cobbledick* is not an inflexible rule and is subject to exception in appropriate circumstances. We urge, however, that nothing in this case justifies an application of such an exception; that, in a word, to hold *Cobbledick* inapplicable to the present case is effectively to disregard that decision.

Respectfully submitted.

ERWIN N. GRISWOLD.
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
Assistant to the Solicitor General.

PHILIP R. MONAHAN,
Attorney.

APRIL 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* RYAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 758. Argued April 26, 1971—Decided May 24, 1971

District Court's order denying respondent's motion to quash a grand jury subpoena *duces tecum* requiring the production of records under his control in Kenya was not final and therefore not appealable, *Cobbledick* v. *United States*, 309 U. S. 323; nor was it rendered an appealable temporary injunction by inclusion of a provision requiring respondent to seek permission from Kenyan authorities to remove some documents from Kenya and if such permission was denied to grant United States agents access to the documents in that country. Pp. 2–5.

430 F. 2d 658, reversed.

BRENNAN, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 758.—October Term, 1970

United States, Petitioner, *v.* Raymond J. Ryan. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 24, 1971]

Mr. Justice Brennan delivered the opinion of the Court.

In March of 1968, respondent was served with a subpoena *duces tecum* commanding him to produce before a federal grand jury all books, records, and documents of five named companies doing business in Kenya. He moved, on several grounds, to quash the subpoena. The District Court denied the motion to quash and, in light of respondent's claim that Kenya law forbids the removal of books of account, minute books, and lists of members from the country without consent of its Registrar of Companies, ordered him to attempt to secure such consent and, if unsuccessful, to make the records available for inspection in Kenya.[1] The Court of Appeals, 430 F.

[1] The District Court ordered that

"I. The motion of [respondent] to quash the subpoena *duces tecum* is denied.

"II. [Respondent] will produce, with the exception of the books of account, minute books and the list of members, before the Federal grand jury at Los Angeles, California, on September 11, 1968, the books, records, papers and documents of Ryan Investment, Ltd., of Nairobi, Kenya, and Mawingo, Ltd., of Nanyuki and Nairobi, Kenya, doing business as The Mount Kenya Safari Club, referred to in the . . . subpoena *duces tecum* served on [respondent].

"III. [Respondent] shall forthwith make application to the Registrar of Companies in Kenya to release the books of account, minute

2d 658 (CA9 1970), held that by directing respondent to make application to a Kenyan official for release of some of the records, the District Court had done "more than deny a motion to quash; it in effect granted a mandatory injunction." *Id.*, at 659. The Court of Appeals therefore concluded that the order was appealable under 28 U. S. C. § 1292 (a)(1)[2] and, reaching the merits, reversed. *Ibid.* We granted certiorari, 400 U. S. 1008 (1971). We conclude that the District Court's order was not appealable, and reverse.

Respondent asserts no challenge to the continued validity of our holding in *Cobbledick* v. *United States*, 309 U. S. 323 (1940), that one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey. Respondent, however, argues that *Cobbledick* does not apply in the circumstances before us because, he asserts, unless immediate review of the District Court's order is available to him, he will be forced to undertake a substantial burden in complying with the subpoena, and will therefore be "powerless to avert the

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books, and list of members so that [respondent] may produce these books, records, papers and documents at the Federal grand jury held at Los Angeles, California, on September 11, 1968, provided that if [respondent] is unable to secure the consent of the Registrar of Companies of Kenya, then [respondent] will make available to agents of the United States Department of Justice and/or the United States Department of the Treasury the books of account, minute books, and list of members, of Ryan Investment, Ltd., and Mawingo, Ltd., and these agents may inspect and make copies of these books and records." App., at 63–64.

[2] The statute provides, in pertinent part, that "The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions . . . ."

mischief of the order." *Perlman* v. *United States*, 247 U. S. 7, 13 (1918).

We think that respondent's assertion misapprehends the thrust of our cases. Of course if he complies with the subpoena he will not thereafter be able to undo the substantial effort he has exerted in order to comply.[3] But compliance is not the only course open to respondent. If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review.[4] But we have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal. *Cobbledick* v. *United States, supra; Alexander* v. *United States*, 201 U. S. 117 (1906); cf. *United States* v. *Blue*, 384 U. S. 251 (1966); *DiBella* v. *United States*, 369 U. S. 121 (1962); *Carroll* v. *United States*, 354 U. S. 394 (1957). Only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims have we allowed exceptions to this principle. We have thus indicated that review is available immediately of a denial of

[3] In such event, of course, respondent could still object to the introduction of the subpoenaed material or its fruits against him at a criminal trial. *United States* v. *Blue*, 384 U. S. 251, 255 (1966).

[4] *Walker* v. *Birmingham*, 388 U. S. 307 (1967) is not to the contrary. Our holding that the claims there sought to be asserted were not open on review of petitioners' contempt convictions was based upon the availability of review of those claims at an earlier stage.

a motion for the return of seized property, where there is no criminal prosecution pending against the movant. See *DiBella* v. *United States*, *supra*, at 131–132. Denial of review in such circumstances would mean that the Government might indefinitely retain the property without any opportunity for the movant to assert on appeal his right to possession. Similarly, in *Perlman* v. *United States*, 247 U. S. 7, 12–13 (1918), we allowed immediate review of an order directing a third party to produce exhibits which were the property of appellant and, he claimed, immune from production. To have denied review would have left Perlman "powerless to avert the mischief of the order," *id.*, at 13, for the custodian could hardly have been expected to risk a citation for contempt in order to secure Perlman an opportunity for judicial review. In the present case, however, respondent is free to refuse compliance and, as we have noted, in such event he may obtain full review of his claims before undertaking any burden of compliance with the subpoena. *Perlman*, therefore, has no application in the situation before us.

Finally, we do not think that the District Court's order was rendered a temporary injunction appealable under 28 U. S. C. § 1292 (a)(1) by its inclusion of a provision requiring respondent to seek permission from the Kenyan authorities to remove some of the documents from that country, and in the event that permission was denied to permit government officials access to the documents in Kenya. The subpoena, if valid, placed respondent under a duty to make in good faith all reasonable efforts to comply with it, and respondent himself had asserted that compliance would be in violation of Kenya law unless permission to remove was properly obtained. Read against this background, the District Court's order did nothing more than inform respondent before the event of what efforts the District Court would consider sufficient

attempts to comply with the subpoena. We cannot imagine that respondent would be prosecuted for contempt if he produced the documents as required but without attempting to obtain permission from the authorities in Kenya. The additional provisions in the order added nothing to respondent's burden and, if anything, rendered the burden of compliance less onerous. They did not convert denial of a motion to quash into an appealable injunctive order.

Reversed.